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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 73.

FREDERICK B. VOGT, APPELLANT,

vs.

CHARLES GRAFF, FREDERICK C. GIESECKE, AND MATILDA S. VOGT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 23, 1911.

(21,730.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 20, 1911.

In the Court of Appeals of the District of Columbia.

No. 2009.

FREDERICK H. VOGT, Appellant,
vs.
CHARLES GRAFF ET AL.

a Supreme Court of the District of Columbia.

No. 23547. In Equity.

SOPHIA VOGT, FREDERICK H. VOGT, OSCAR G. VOGT, CLIFFORD F. VOGT, BERTHA VOGT BRAND, LEO J. VOGT, Complainants,
vs.
CHARLES GRAFF, FREDERICK C. GIESEKING, and MATILDA S. VOGT, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill to Construe Will, etc.*

Filed Oct. 3, 1902.

In the Supreme Court of the District of Columbia.

No. 23547, Equity Doc. 53.

SOPHIA VOGT, FREDERICK H. VOGT, OSCAR G. VOGT, CLIFFORD F. VOGT, BERTHA VOGT BRAND, LEO J. VOGT
vs.
CHARLES GRAFF, FREDERICK C. GIESEKING, and MATILDA S. VOGT.

To the honorable the justice- of said court:

The bill of complaint of the above named complainants respectfully shows:

1. That they are all citizens of the United States and all residents

of the District of Columbia, that all of said complainants are adults over the age of twenty one years; that they bring this suit in their own several rights as will more fully hereinafter appear and that the complainants Sophia Vogt and Oscar G. Vogt also join in this proceeding as the trustees under a certain deed in trust from the complainant Leo J. Vogt, which conveyance will be more fully hereinafter recited.

2. That the defendants are also all citizens of the United States and residents of said District; that the defendant Matilda S. Vogt is an infant under the age of twenty one years and will be as complainants are informed and believe and consequently aver thirteen years of age on the 12th day of October, A. D., 1902; that the defendants, Graff and Kieseking are sued as the executors and trustees of the estate under the last will and testament of one John L. Vogt deceased, as will more fully hereinafter appear and that the defendant Matilda S. Vogt is sued in her own right as the sole heir apparent of the complainant Frederick H. Vogt as said matter will more fully hereinafter be made to appear.

3. That on or about the 8th day of August, A. D., 1894, one John L. Vogt, late a citizen of the United States, resident in said District, departed this life therein, testate, leaving him surviving, the complainant, Sophia Vogt his widow, and the other complainants herein, as his only children and heirs at law.

4. That said deceased died possessed of personal estate of considerable value, but the full extent, nature and value thereof is not now fully known to these complainants and that at the time of his death said deceased was seized, in fee simple, of the following described real estate, situate, lying and being in the city of Washington, in the District of Columbia, viz:

(*a.*) Lot numbered thirteen (13) in John Davidson's Heirs' subdivision in square numbered two hundred and eighty seven (287) as per plat duly recorded among the records of the surveyor's office of said District in Book N. K. pages 84 & 85, which lot is improved by premises known as No. 806 12th St., north west, the same being a three story and cellar brick building, with a two story brick stable in the rear thereof and which lot and improvements are assessed in the current tax records of said District as of the value of eighty four hundred and fifty ($8450.00) dollars and are said to be under rental at the rate of seventy dollars ($70.00) per month.

(*b.*) Part of lot numbered four (4) in square numbered three hundred and sixty nine (369) described as follows: Beginning for the same on L street at the south east corner of said lot and running thence west on said street twenty (20) feet, thence north one hundred and twenty (120) feet, thence east twenty (20) feet and thence south one hundred and twenty (120) feet to the place of beginning, which lot is improved by premises No. 923 L street north west, the same being a two story and attic frame building with a two story brick stable in the rear thereof and which lot and improvements are assessed in said current tax records as of the value of thirty two
2 hundred and forty dollars ($3240.00) and are said to be under rental at the rate of thirty (30) dollars per month.

(*c.*) Parts of lots numbered two (2) and ten (10) in square number three hundred and seventy nine (379) described as follows: Beginning for said part of lot two (2) at a point on Pennsylvania avenue distant one hundred and forty eight (148) feet, nine (9) inches west of the south east corner of said square and running thence west on said avenue fourteen (14) feet, nine (9) inches to the south west corner of said lot two (2) thence northerly on the west line of said lot and at right angles to said avenue seventy two (72) feet, nine (9) inches, thence east on the rear line of said lot two (2) to a point that will be intersected by a line drawn northerly at right angles to said avenue from the beginning and thence from said point southerly in a straight line to the place of beginning.

And beginning for said part of lot ten (10) at a point in the dividing line between lots (9) nine and ten (10) distant twenty (20) feet south of the north west corner of said lot ten (10) and running thence south sixty (60) feet, thence east sixteen (16) feet to a fourteen (14) feet wide alley, thence north on said alley sixty (60) feet and thence west sixteen (16) feet to the place of beginning, which lots are improved by premises No. 913 Pennsylvania avenue north west, the same being a three story and cellar brick store and dwelling and which lots and improvements are assessed in said tax records as of the value of fourteen thousand three hundred and ninety two dollars ($14,392.00) and are said to be under rental at the rate of one hundred and eighty dollars ($180.00) per month.

(*d.*) Two parts of lot numbered fifteen (15) in square numbered four hundred and thirty one (431) both pieces of said lot being described as one piece as follows: Beginning for the same at the north east corner of said lot and running thence south on Seventh street twenty two (22) feet, seven (7) inches, thence west one hundred (100) feet to a ten (10) feet wide public alley, thence north on said alley twenty two (22) feet, seven (7) inches and thence east one hundred (100) feet to the place of beginning which lots are improved by premises No. 426 7th street north west, the same being a four story and cellar brick store and which lots and improvements are assessed in said current tax records as of the value of twenty four thousand three hundred and thirty four dollars ($24,334.00) and are said to be under rental at the rate of two hundred and eight 33/100 dollars ($208.33) per month.

(*e.*) Lot numbered thirty two (32) in John L. Vogt's sub-division in square numbered four hundred and fifty six (456) as per plat duly recorded among the records of the surveyor's office of said District in Book 16 page 84, which lot is improved by premises No. 607 E street north west, the same being a four story and basement brick dwelling and which lot and improvements are assessed in said current tax records as of the value of eleven thousand one hundred and ninety four dollars ($11,194.00) and is not under rental being in the occupation of the complainant Sophia Vogt in accord-
3 ance with the terms of the will of said deceased as said matter will be more fully hereinafter recited.

(*f.*) Part of lot numbered six (6) in square numbered four hundred and fifty seven (457) described as follows: Beginning for the

same at the north west corner of said lot six (6) fronting on a thirty (30) feet wide public alley and running thence east thirty four (34) feet ten and a half (10½) inches, thence south eighty one (81) feet, ten and a half (10½) inches to a six (6) feet wide alley, thence west thirty four (34) feet, ten and a half (10½) inches to a twenty five (25) feet wide public alley and thence north eighty one (81) feet, ten and a half (10½) inches to the place of beginning which lot is improved by premises in the rear of Nos. 631 and 633 D street north west, the same being a two story and brick wagon shed and stable and which lot and improvements are assessed in said current tax record as of the value of forty two hundred and forty nine dollars ($4249.00) the same being under rental in connection with other premises owned by said deceased and hereinafter mentioned.

(*g.*) The north thirty (30) feet front on 7th street by the full depth of original lot numbered twelve (12) in square numbered four hundred and fifty seven (457) which lot is improved by premises Nos. 427 and 429 7th street north west the same being a three story and cellar brick building with a two story brick building in the rear thereof and which lot and improvements are assessed in said current tax records as of the value of twenty five thousand two hundred eighty for ($25,284.00) dollars and is said to be under rental at the rate of one hundred twenty five dollars ($125.00) per month.

(*h.*) Part of lot numbered sixteen (16) in square numbered four hundred fifty seven (457) which lot is improved by premises No. 620 E street north west, the same being a three story and basement brick store and dwelling and which lot and improvements are assessed in said current tax records as of the value of twelve thousand three hundred sixty six dollars ($12,366.00) and are under rental with other premises owned by said deceased and hereinafter mentioned.

(*i.*) Part of said lot numbered sixteen (16) in said square numbered four hundred and fifty seven (457) which lot is improved by premises No. 622 E street north west, the same being a three story and basement brick store and dwelling and which lot and improvements are assessed in the said current tax record as of the value of thirteen thousand six hundred and sixty eight dollars ($13,668.00) and it is said are under rental in connection with other property owned by said deceased and hereinafter mentioned.

(*j.*) Part of said lot numbered sixteen (16) in said square numbered four hundred and fifty seven (457), the said three (3) parts of said lot sixteen (16) being described as one part of said lot as follows, viz: All of lot numbered sixteen (16) in square numbered four hundred and fifty seven (457) except the east eleven and one half (11½) inches front on E street by the full depth of said lot which lot is improved by premises known as the rear of Nos. 620 & 622 E street north west, the same being a two story brick bakery and which lot and improvements are assessed in said current tax records as of the value of three thousand five hundred ninety nine dollars ($3,599.00) and it is said are under rental jointly with those parcels identified herein as *"f," "h"* & *"i"* at the rate of three hundred dollars ($300.00) per month.

(*k.*) All of lot lettered "N" in G. Bailey's sub-division in square numbered five hundred seventy (570)) as per plat in Liber B, folio 81 of the records of the surveyor's office of said District, except the south three (3) inches front on Third street by the full depth of said lot, which lot is improved by premises No. 419 3d street north west, the same being a three story brick dwelling and which lot and improvements are assessed in said current tax records as of the value of six thousand three hundred and eight dollars ($6308.00) and is said to be under rental at the rate of fifty 63/100 dollars ($50.63) per month and that the total assessed value of all the real estate of which said deceased died seized is one hundred twenty seven thousand eighty four dollars ($127,084.00) and the rent income therefrom is alleged by the defendants Graff and Gieseking to be eleven thousand five hundred sixty seven 52/100 dollars ($11,567.52) per annum.

5. That said deceased left a last will and testament dated the 7th day of March, A. D., 1894, which paper was thereafter to-wit on the 13th day of September, A. D., 1894, by this honorable court holding a special term for orphans' court business duly admitted to probate and record, the effect of which however was only to admit same as a will of personal estate, and at the same time letters testamentary upon the estate of said deceased were granted to the defendants Graff and Gieseking the executors nominated by said will, who thereafter qualified as such and have been since and are still acting in that capacity and that thereafter towit: on the 3d day of July, A. D., 1900 the said court admitted said will to probate and record as a will of real and personal estate as all of said matters will more fully appear on reference had to the record and proceedings in administration case No. 6284 on file in the office of the register of wills of said District, which record and proceedings these complainants will beg leave to produce and read as part hereof at any hearing of this cause and these complainants file herewith; and as part hereof a certified copy of the will of said deceased which is marked "Complainants' Exhibit No. 1" and which it is prayed may be read as part hereof at any hearing of this proceeding.

6. That as will appear from said will said testator appointed or attempted to appoint the defendants Graff and Gieseking (and said defendants claim he did appoint them) trustees of his real estate and defined or attempted to define their powers and duties and the limitations of said powers and duties.

7. That since the death of said testator the real estate of which he died seized has remained intact except that the complain-
5 ant Leo J. Vogt, on or about the 16th day of September, A. D., 1902 by his deed of trust recorded among the land records of said District on the 19th day of September, A. D., 1902, conveyed all his undivided interest in and to the several parcels of real estate, whereof the late John L. Vogt, of said District, died seized and possessed, and in and to all the undivided and undistributed estate of said decedent to Horatio N. Taplin and Thomas J. Deavitt to secure the payment to the "Capital Savings Bank and Trust Co., of Montpelier, Vermont" of his note for six thousand

dollars ($6,000.00) payable in three (3) years, with interest at the rate of six (6) per centum per annum payable semi-annually and except that the said complainant Leo J. Vogt, on or about the same day, by his deed in trust, recorded among the land records on the said 19th day of September, A. D., 1902 conveyed subject to said deed of trust all his interest in said estate to the complainants Sophia Vogt and Oscar G. Vogt as trustees upon the following trusts: "The said parties hereto of the second part are to have the absolute title, charge and control of the right, title, interest and estate of said party hereto of the first part, in or to the property hereinbefore described, or the proceeds thereof, if sold, to collect all rents and other incomes arising in or growing out of said property or the proceeds thereof, or to do every act and thing necessary for its care and preservation: the net proceeds derived from such property after the payment of all taxes, repairs and other necessary charges and expenses arising in or growing out of the care, preservation and protection of the same, shall be set aside and turned over monthly to said party hereto of the first part, the said Leo J. Vogt, during his life time for his sole and absolute use and benefit. The said parties of the second part or the survivor shall have authority to sell or dispose of the interest of said party hereto of the first part in any or all of said property and to convey in fee simple absolute or to encumber by way of mortgage or deed of trust without obligation on the part of the purchaser or person lending money to see to the application of the purchase money or money lent, when in their judgment it is deemed to be the best interest of the estate, in which event the net proceeds of such sale or sales *is* to be invested for the benefit of the said party hereto of the first part, the income thereof to be paid to said party hereto of the first part as hereinbefore described. And whenever in the judgment of the said parties hereto of the second part it is to the interest of said party hereto of the first part that he should have any or all of his estate or interest in the property heretofore described or the proceeds derived therefrom, then said parties hereto of the second part are authorized and empowered to convey to the said party hereto of the first part such interest or interests as the said parties hereto of the second part shall deem proper. And upon the death of the said party hereto of the first part, his interest in the aforesaid property shall be disposed of and the proceeds thereof paid to his heirs, executors or assigns, as he may by will direct and in default of such direction or disposition by will, the proceeds
6 shall be paid to his heirs at law" and except that all the said children and heirs at law of said deceased, the complainants Sophia Vogt and Oscar G. Vogt joining therein as trustees under said last mentioned deed in trust on the 29th day of September, A. D., 1902, by their deed in fee simple recorded on the 30th day of September, A. D., 1902, conveyed all their interests in and to said sub-lot numbered thirty two (32) in square numbered four hundred fifty six (456) and part of lot numbered twelve (12) in square numbered four hundred and fifty seven (457) as said parcels of land are more fully hereinbefore described to the complainant Sophia Vogt.

8. That it is the desire of the complainants, who are the only children and heirs at law of said deceased and except as to the land specifically devised to the complainant Sophia Vogt and as aforesaid conveyed to her by her said co-complainants, the only beneficiaries under the will of said testator so far as said real estate is concerned, that said real estate continue to be held intact and that it be not sold and to this end the said children and heirs at law of said deceased elect to take said real estate instead of their *pro rata* parts of the proceeds of any sale which said defendants Graff and Gieseking may wish or attempt to make thereof and these complainants do here protest against said defendants attempting to make any sale of said real estate, as they have threatened and were and are preparing to do.

And these complainants further say that it is against their best interests to sell said real estate inasmuch as the income from the part thereof coming to them now pays about ten per cent. upon the assessed value of said property and the proceeds of any sale thereof, if invested would be unlikely to produce a greater income than from four to five per cent.

9. That many questions have arisen concerning the construction of the will of said deceased and respecting the powers and duties of the defendants Graff and Gieseking as executors and trustees under same and as well concerning the nature and quality of the estate said defendants hold in the real estate of said deceased and whether in fact they hold any estate whatsoever therein, and as to their rights to force a sale of said real estate despite the protests and against the objections of the complainant-, children and heirs at law of said deceased and also regarding the commissions claimed by said defendants and as to the nature of the estates of certain of the devisees of said decedent in said real estate and other matters which are uncertain and equivocal in expression and intent and which require the construction of this honorable court and should be by it adjudicated and determined.

10. That said testator in the first, second, third, fourth, fifth and sixth paragraph- of said will provided for the payment of the indebtedness of the testator, the settlement of fiduciary matters, the purchase of a burial site and monument and the bequest of various sums of money to divers concerns and persons and the sev-
7 enth paragraph contains a bequest of all the testator's personal estate in his house at 607 E street, north west except stocks and bonds, to his wife the complainant Sophia Vogt and provides that she shall also have possesson of said home free from rent, taxes, insurance and repairs, and the eighth paragraph thereof bequeaths the rest and remainder or residue of the testator's personal estate equally between his wife and children and provides that the shares therein of his minor children shall be invested by his wife for the sole use and benefit of said minor children who is to act as their guardian without bond and that the ninth paragraph of said will provides that until his youngest surviving child shall attain the age of twenty one years, his executors are to pay out of the residue of the income from his real estate the sum of three hundred and fifty

dollars ($350.00) monthly to his wife and fifty dollars ($50.00) monthly to his grand-daughter, Mathilda S. Vogt subject to certain terms and conditions, and the balance to be divided among his children and the shares thereof coming to his minor children to be paid to his wife for the maintenance and education of the said children and for which she need not render any account.

That these complainants are not advised whether the payment of the testator's debts, personal and fiduciary, and the money bequests mentioned in the first to the seventh paragraph of said will are to be paid out of the personal estate of said deceased, whether in case of an insufficiency of personal estate they are to be paid *pro rate* or in the order in which they are made, so far as said personal estate will extend, or whether in the event of a deficiency of personal estate to pay the same in full, whether said legacies are to be considered as creating liens upon the real estate of said deceased; that these complainants are also not advised as to whether the disposition of said residue of said testator's personal estate as mentioned in the eighth paragraph of said will is intended to mean, such personal estate as remains after the satisfaction of the testator's debts and money legacies and the bequest to the testator's wife mentioned in the seventh paragraph of said will, or whether the bequest of such residue of said personal estate applies only to and is to be read solely in connection with the aforesaid seventh paragraph; that these complainants are also not advised whether the use in the ninth paragraph of said will of the words "out of the residue of the income from my real estate to pay" is intended to apply or confine the payment of debts and legacies to the income from said real estate, or whether it has some other meaning, or whether it is mere surplusage and without any particular meaning or signification; that these complainants are also not advised of the meaning in the fifth paragraph of the use of the words "The said sum shall be set aside by my executors upon the qualification" and whether the word "qualification" is to apply to some condition upon the happening of which said legacy is to vest or to be paid, or whether it is intended to relate to the qual-
8 ification of the executors by their giving bond and taking the oath of office and that the complainants are also not advised, nor does said will express upon what condition of affairs said executors shall exercise a discretion in not paying the income of the legacy mentioned in the fifth paragraph of said will to Pauline Vogt, who has not however remarried, in the event that she remarries and complainants are consequently in doubt whether said executors have or that said testator intended them to have an arbitrary discretion in the event of the remarriage of said Pauline Vogt to pay or not to pay said income, and no matter what the reason to her and that said complainants are also not advised of the intention of the testator or the meaning in the ninth paragraph of said will of the use of the words "2nd to my grand-child Matilda Sophia Vogt, the sum of fifty dollars ($50.00) monthly in the same manner and under the like conditions as the specific legacy to her in paragraph heretofore numbered five (5)" and whether the whole of said paragraph five is to apply to said bequest or only a part of said paragraph and if a part

thereof, which part. Being in doubt and unadvised as to all of said matters hereinbefore detailed these complainants request that this honorable court, if it shall after the coming in of the answers of the defendants Graff and Gieseking be deemed necessary to do so, construe, adjudicate and determine same according to law, so that justice to all concerned may be done and the intentions of the testator in the premises may be fully carried into effect.

That concerning the debts of said deceased and said legacies these complainants are informed and believe it is the fact that said defendants Graff and Gieseking construed said will to mean that same should be paid out of the testator's personal estate and that said estate being sufficient for the purpose that they have fully paid said debts and legacies, but inasmuch as there has been no final accounting of said matter and no final distribution of the remainder of said personal estate among the persons entitled thereto complainants ask, without in any manner intending to reflect on the probity or faithful conduct of said defendants Graff and Gieseking, which these complainants do not do and are not to be understood as doing by the institution of these proceedings that the accounts of said defendants Graff and Gieseking as said executors and trustees be audited and settled by the auditor of this court.

11. That in and by the last clause of the seventh paragraph of said will the said testator stated, "She (meaning his wife) shall also have possession of said home, (meaning premises No. 607 E street, N. W., or sub lot thirty two (32) in square four hundred fifty six (456) free from rent, taxes, insurance and repairs" and in the tenth paragraph thereof the said testator provides "I give, devise and bequeath when my youngest surviving child shall have attained the age of 21 years, unto my wife Sophia lots 32 in square 456 and 12 in square 457 in the District of Columbia" and in the clause following said testator provides that "all the rest and residue of my real estate shall, when my youngest surviving child attains the age
9 of 21 years or one year thereafter in the discretion of my executors, be sold" etc. These complainants have no personal knowledge of the legal effect of said paragraphs, or whether the same did or did not vest a fee simple estate or title to said lots in the complainant, Sophia Vogt, but they are advised by counsel that such effect would probably be given to said devise by an equity court, yet that a title in fee simple would probably not be passed by any title company without a previous judicial construction thereof; that these complainants believing it was the intention of the said testator to vest his said wife, the complainant Sophia Vogt with a fee simple title to said lots executed to her as aforesaid the deed mentioned in paragraph seven hereof, but in this connection complainants are further advised by counsel that if this honorable court construes said will as only having passed or vested a life estate in said lots in said Sophia Vogt, the deed of the complainants to her will not be fully effective to vest her with a fee simple estate, should the court determine that the complainant Frederick H. Vogt is only seized of an equitable or legal life estate in his share of his father's estate, and in which

event he could not convey a fee simple title in said lots or his interest or remainder therein to the said Sophia Vogt.

Because of said conditions said complainants request that this honorable court construe, adjudicate and determine said matters.

12. That the residuary clause of said will reads as follows: "All the rest and residue of my real estate, shall when my youngest surviving child attains the age of 21 years or one year thereafter in the discretion of my executors, be sold by my executors at public auction, after due notice in the newspapers of this city. The proceeds of said sales shall be then divided among my heirs, share and share alike and paid over to them respectively at once, excepting the share coming to my son Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick Gieseking, as trustee-, by them invested, the income to be paid to his h[illegible]s after his death." That respecting the devise to the complainant Fred H. Vogt, these complainants are advised by counsel the legal effect thereof, is to vest the said complainant Frederick H. Vogt, who is usually called Fred H. Vogt with an estate in fee simple, but as said matter will be uncertain and open to question until a court of competent jurisdiction has passed thereon, these complainants request that this honorable court construe, adjudicate and determine said matter and if it be determined that said complainant Frederick H. Vogt is seized of an estate in fee simple that this court also determine whether his said interest in the estate of his said father vests directly in him or whether in the defendants Graff and Gieseking as trustees for his use. That in connection with said paragraph, these complainants further aver that the youngest surviving child of said testator viz: Clifford F. Vogt attained his majority on the 6th day of July, A. D., 1902; that the complainant Frederick H. Vogt is now unmarried, is about the age of thirty nine (39) years and that the defendant Matilda S. Vogt is his only child and heir apparent, and as such is made a party defendant to this proceeding.

That these complainants are advised by counsel that upon the death of said testator the estate held by him in the real estate hereinbefore described immediately vested in his children and heirs at law and that no estate legal or equitable vested in the defendants Graff and Gieseking as trustees or executors under the will of said testator; that the power of sale in said executors is a mere naked power and not mandatory in its nature; that any purchaser at any sale made by them would be obliged to see to the proper application of the purchase money realized at such sale; that the children and heirs at law of said deceased have the option and right of election whether to take said real estate or the proceeds of any sale thereof and which option or election they see fit to exercise by taking said real estate; that said defendants Graff and Gieseking are without power to advertise and sell said real estate or any part thereof in the face of the opposition and objections of said children and heirs thereto; that a sale of said property is against the best interests of the complainant-, children and heirs at law of said deceased who are the sole beneficiaries respecting said real estate under said will and if said sale is permitted said complainants will suffer great and

irreparable injury and loss and any attempt to make same should be prevented and enjoined by this honorable court, and these complainants submit all of said matters and objections for the construction, adjudication and determination of this honorable court.

13. That in and by the last paragraph of said will the testator provided "I hereby nominate, constitute and appoint Charles Graff and Frederick C. Gieseking executors of this my last will and testament hereby limiting the compensation of my executors to five per cent. (5%) jointly on my realty and personalty and to two and one half per cent. (2½%) jointly on the rent income." That in connection with said appointment of said defendants as executors of said will, these complainants are advised that said compensation was not intended by said testator as a gratuity or present to said executors and was intended solely as it is expressed in said clause as compensation for services to be rendered by them and its allowance was only made in the event that said executors should render the necessary services in making advantageous sales of said real estate and for distributing the proceeds of said sales among the heirs at law of said testator and said testator did not intend to contemplate that said compensation should be paid to said executors in the event that they made no sales of said real estate and did not distribute any proceeds of such sales among his children and heirs at law, nor did said testator intend or contemplate that said executors should receive the full sum of five per cent. (5%) even though they should make sale of said real estate, but only intended and contemplated that said percentage should be the maximum amount they could or
11 should receive for their services, nor did said testator intend or contemplate that said executors should receive such percentage for their management, care and rental of said property as is evidenced by his allowance to them of two and a half per cent. (2½%) upon the rent income, and these complainants submit all of said questions for construction, adjudication and determination, by this honorable court.

14. That there are, or other questions of doubt may arise or be suggested during the proceeding touching and concerning the construction of said will, all of which doubts complainants ask may be construed, interpreted, adjudicated and decided so that any further construction thereof may be avoided.

Wherefore the premises considered and complainants being without adequate remedy except in this honorable court and being in imminent danger of suffering great and irreparable injury and the exigencies of the situation complained of by them demanding the interposition and aid of the court; they pray.

1st. That Charles Graff, Frederick Gieseking and Matilda S. Vogt named in the caption of this bill as defendants may be made defendants hereto and that the writs of subpœna issue out of this honorable court, requiring said defendants to appear and answer this bill to the fullest of its exigencies.

2d. That a guardian *ad litem* be appointed by this honorable court, to appear for and answer this bill on behalf of Matilda S. Vogt, who is an infant as aforesaid.

3d. That the court construe, interpret, adjudicate and determine all the specific questions of construction set out herein concerning the will of said deceased or which may arise during the progress of said cause.

4th. That the court determine and decree the particular estates of said trustees and as well the respective heirs at laws of said deceased in and to the real estate mentioned in this bill.

5th. That the powers and duties of the defendant trustees and the limitations thereof be defined and decreed.

6th. That if it be determined that the devisees or heirs at law of said deceased have a vested estate in the real estate of said deceased that the decree be so made as to operate as a conveyance to them of said real estate fully divested of any claims of said defendant trustees, or that a trustee be appointed to make a proper conveyance of said real estate to the complainants according to their respective interests.

7th. That it be determined whether said trustees defendants hereto have the right to force a sale of said real estate against the wishes, objections and protests of these complainants and as well whether the complainants have an option or right of election to take said real estate or the proceeds of a sale thereof.

8th. That the court determine and decide all questions concerning what if any commission is due or payable to said defendant trustees for their services under the will of said deceased.

9th. That the court take and state all necessary accounts in
12 the premises and after so doing discharge said defendant trustees from further responsibility or duty in the premises.

10. That pending a final hearing of this cause, the full construction of said will and the final decision upon all matters properly in issue herein that said defendants Graff and Gieseking be enjoined and restrained from advertising or selling said property or from doing anything whatever to that end.

11th. And that the complainants may have such other and further relief as the nature of the case may seem to demand and to the court appear meet and proper.

SOPHIA VOGT.
BERTHA VOGT BRAND.
FREDERICK H. VOGT.
OSCAR G. VOGT.
LEO J. VOGT.
CLIFFORD F. VOGT.

ALEXANDER H. BELL,
Compl'ts' Sol'r.

DISTRICT OF COLUMBIA, *ss:*

We, Sophia Vogt, Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand and Leo J. Vogt on oath depose and say, that we have heard — the foregoing bill by us subscribed and know the contents thereof; that the facts stated therein upon our personal

knowledge *our* true, and those stated upon information and belief. we believe to be true.

SOPHIA VOGT.
BERTHA VOGT BRAND.
FREDERICK H. VOGT.
OSCAR G. VOGT.
LEO J. VOGT.
CLIFFORD F. VOGT.

Subscribed and sworn to before me this 2nd day of October, A. D., 1902.

ELLIS HUGHES,
Notary Public, D. C.

[NOTARIAL SEAL.]

COMPLAINANTS' EXHIBIT No. 1.

Filed Oct. 3, 1902.

This is the last will and testament of me John L. Vogt, of the city of Washington District of Columbia, intending hereby to dispose of all property and estate real and personal, which I now own or may hereafter acquire, and to which I may be in any manner entitled at the time of my death, and hereby revoking all wills or codicils by me at any time heretofore made.

13 Paragraph 1. First. I direct my executors hereinafter named to purchase a lot in Rock Creek cemetery and a family monument, both to cost not more than three thousand dollars ($3000) and to be selected by my wife.

Paragraph 2. Second. After the payment of all my just debts (including all money held by me as treasurer of associations, as guardian, as administrator or any other funds held by me in trust—all of which are to be paid over immediately) and funeral expenses (including monument and lot above named), I give and bequeath to the trustees of the Concordia Lutheran church, of which I am a member, the sum of one thousand dollars ($1000)

Paragraph 3. Third. I give and bequeath to the trustees of the *the* J. L. V.

Page 2. German Orphan Asylum Association of the Dist. of Columbia the sum of one thousand dollars ($1000)

Paragraph 4. Fourth. I give and bequeath to Pauline Vogt, the wife of my son Fred, the sum of one thousand dollars ($1000)

Paragraph 5. Fifth. I give and bequeath to my grand-child Mathilda Sophia Vogt, the sum of two thousand dollars ($2000) to be paid to her when she is 21 years old. The said sum shall be set aside by my executors upon the qualification, and properly invested by them. The income so arising shall be paid to her mother Pauline Vogt, provided she does not re-marry. In such event, however, my executors may in their discretion, continue the payment of said income, or hold and invest the same for the benefit of my said grand child, until she attains the age of 21 years. In case of the death of

my grand child before she attains the said age, then said legacy shall be divided equally among my wife and children.

Paragraph 6. Sixth. I give and bequeath to my wife's cousin, Metta Warnke, at Burg near Bremen, Germany, the sum of five

J. L. V.

Page 3. hundred, ($500) dollars,

Paragraph 7. Seventh. I give and bequeath to my wife Sophia, all of my horses, carriages, buggies, sleigh, harness and robes, and all personal property in my house 607 E St. N. W. excepting stocks and bonds. She shall also have possession of said home, free from rent, taxes insurance and repairs.

Paragraph 8. Eighth. I give and bequeath all the rest and residue of my personal estate equally among wife Sophia and my children. The shares of my minor children shall be invested by my wife for the sole use and benefit of said minor children. My wife shall act as guardian for the minor children, without bond.

Paragraph 9. Ninth. Until my youngest surviving child shall have attained the age of 21 years, I direct my executors, out of the residue of the income from my real estate to pay, 1st to my wife Sophia the sum of three hundred and fifty dollars ($350) monthly; 2nd. to my grandchild Mathilda Sophia Vogt, the sum of fifty dollars ($50) monthly in the same manner and under the like

14 conditions as the specific legacy to her in paragraph heretofore numbered five (5); 3rd. the balance to be divided

J. L. V.

Page 4. equally among my children. The shares thus coming to my minor children shall be paid to my wife for the maintenance and education of the said children, and for which she need not render any account.

Paragraph 10. Tenth. I give, devise and bequeath, when my youngest surviving child shall have attained the age of 21 years, unto my wife Sophia lots 32 in square 456 and 12 in square 457, in the District of Columbia.

All the rest and residue of my real estate, shall, when my youngest surviving child attains the age of 21 years or one year thereafter in the discretion of my executors, be sold by my executors at public auction after due notice in the news papers of this city. The proceeds of said sales shall be then divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death.

I hereby nominate, constitute and appoint Charles Graff and Frederick Gieseking executors of this my last will and testament, hereby limiting the compensation of my executors to five per cent. (5%) jointly on my realty and personalty. And to two and one half per cent. (2½%) jointly on the rent income. In testimony whereof I hereunto set my hand this 7th day of March A. D. 1894.

JOHN L. VOGT.

This page and the three preceding pages bearing initials J. L. V. were signed, published and declared by John L. Vogt to be his last will and testament this seventh day of March A. D. 1894 in the presence of us, who at his request, in his presence and in the presence of one another, have subscribed our names as witnesses thereto.

MYER COHEN.
WILLIAM HELMUS.
CHARLES A. SAUTLER.

DISTRICT OF COLUMBIA, *To wit:*

On the 6th day of September 1894, came Sophia Vogt and made oath on the Holy Evangels of Almighty God, that she does not know of any will or codicil of John L. Vogt, (except a will of an earlier date) late of said District, deceased, other than the aforegoing instrument of writing dated March 7th 1894 and that she found the same in the box belonging to the deceased at the Washing- Safe Deposit Co. and said John L. Vogt died on or about the 8th day of August 1894.

MRS. SOPHIA VOGT.

15 Sworn to and subscribed before me,

S. THOMPSON, JR.
Acting Register of Wills for the District of Columbia.

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

SEPTEMBER 7*th*, 1894.

DISTRICT OF COLUMBIA, *To wit:*

This day appeared William Helmus, Charles A. Sautler and Myer Cohen the subscribing witnesses to the foregoing last will and testament of John L. Vogt, late of the District of Columbia, deceased, and severally made oath on the Holy Evangels of Almighty God, that they did see the testator therein named sign this will; that he published, pronounced, and declared the same to be his last will and testament; that at the time of so doing he was, to the best of their apprehension, of sound and disposing mind, and capable of executing a valid deed or contract; and that their names as witnesses to the aforesaid will were signed in the presence and at the request of testator and in the presence of one other.

Test:

L. P. WRIGHT,
Register of Wills.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

I, Levi P. Wright, register of wills for the District of Columbia, and *ex-officio* clerk of the said special term for orphans' court busi-

ness, do hereby certify that the foregoing is a true copy of the original will of John L. Vogt deceased, and the probate thereto, filed and recorded in the office of the register of wills for the District of Columbia aforesaid; and also that the said will after having been proven by the witnesses whose names appear in the foregoing probate, was, by order of the supreme court of the District of Columbia, holding a special term for orphans' court business, duly admitted to probate and record on the thirteenth day of September A. D. one thousand eight hundred and ninety-four.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said supreme court, special term for orphans' court business, this 30th day of October anno Domini 1894.

L. P. WRIGHT,

[SEAL.] *Register of Wills for the District of Columbia and Ex-officio Clerk of the said Special Term for Orphans' Court Business.*

16 *Answer of Matilda S. Vogt.*

Filed Jan. 27, 1903.

In the Supreme Court of the District of Columbia.

No. 23,547, Eq. Doc. 53.

SOPHIA VOGT ET AL.
vs.
CHARLES GRAFF ET AL.

Answer of the Defendant Matilda S. Vogt, by her Guardian, Pauline Vogt, to the Complainants' Bill.

This defendant being an infant under the age of twenty-one years, can neither admit nor deny the allegations contained in said bill, but submits her rights to the protection of this honorable court.

PAULINE VOGT,
Guardian of Matilda S. Vogt.

LEON TOBRINER,
Sol'r for Def't.

I, Pauline Vogt on my oath do depose and say that — have heard read the foregoing answer by me subscribed as guardian of said Matilda S. Vogt; that the facts therein stated from my personal knowledge are true and those set forth on information and belief, I believe to be true.

PAULINE VOGT.

Subscribed and sworn to before me this 27th day of January, A. D. 1903.

J. R. YOUNG, *Clk,*
By R. J. MEIGS, JR.

Replication.

Filed Feb. 4, 1903.

In the Supreme Court of the District of Columbia.

#23547. Equity.

SOPHIE VOGT ET AL.
vs.
CHARLES GRAFF ET AL.

The complainants join issue upon the answers of the defendants herein filed.

ALEXANDER H. BELL,
Compl'ts' Sol'r.

17 *Opinion.*

Filed Dec. 13, 1904.

In the Supreme Court of the District of Columbia. In Equity.

Equity. No. 23547.

SOPHIA VOGT ET AL.
vs.
CHARLES GRAFF ET AL.

The bill was filed in this case for the construction of the will of the late John L. Vogt, and for an accounting against the executors and trustees named therein. By prior orders and decrees of this court all matters in dispute between the parties have been determined, save the proper construction of the following clause of the will:

"All the rest and residue of my estate shall, when my youngest surviving child attains the age of twenty-one years or one year thereafter in the discretion of my executors, be sold by my executors at public auction after due notice in the newspapers of this city. The proceeds of said sale shall then be divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son Fred H. Vogt. Said share shall be paid to Charles Graff and Fred Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid his heirs after his death."

The controversy over this provision is between Fred H. Vogt, the son of the testator, and his infant daughter, Matilda S. Vogt, the former claiming that, by the application of the rule in Shelly's case, he takes an absolute estate on the principal under this paragraph, while on behalf of the infant it is contended that he takes only the

income of the property for life, the principal going to his daughter upon his decease.

The question has been very ably and fully argued before me by counsel for the respective parties.

Undoubtedly under the devise in this case there is an equitable conversion, and the property is to be treated as personal, not real. To quote the language of the supreme court in Cropley *vs.* Cooper, 19 Wall. 174: "Real estate having been directed by the will to be converted into money, it is to be regarded for all the purposes of the case, as if it were money at the time of the death of the testator. That it was not to be sold until after the termination of two successive life estates, does not affect the application of the principal. Equity regards substance and not form, and considers as done that which is required to be done. The sale being directed absolutely, the time is immaterial."

It must also be conceded that the rule in Shelly's case is
18 applicable, by analogy, to personal property, and to the same extent as to real property. Hughes *vs.* Nicklas, 70 Md. 484.

The relative weight of the rule and the intention of the testator, when they are in apparent conflict, is clearly indicated in the language of Mr. Justice Swayne, in Daniel *vs.* Whartenby, 17 Wall. 639, (quoted with approval in De Vaughn *vs.* Hutchinson, 165 U. S. 566): "In considering it (the rule in Shelly's case, 1 Coke, 88) with reference to the present case a few cardinal principles, as well settled as the rule itself, must be kept in view. In construing wills, where the question of its application arises, the intention of the testator must be fully carried out, so far as it can be done consistently with the rules of law, but no farther. The meaning of this is, that if the testator has used technical language, which brings the case within the rule, a declaration, however positive, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule and cannot affect the result. But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail."

In the present case, it does not seem to me to admit of doubt that so far as the technical language used by the testator is concerned, it is precisely the language which sets in operation the rule in Shelly's case, and that there are no such explanatory or qualifying expressions as modify the technical terms. The income of the property is limited to Fred H. Vogt for life and, after his death, the principal to his heirs, in simple and unmistakable terms. Undoubtedly the testator's intention was exactly contrary to the effect of the technical language used, but there are no words used which qualify the estate created.

But it is contended on behalf of the infant that in order that the rule may apply, the estate of both the ancestor and heir must be of the same nature or quality, "either both legal or both equitable, and

not one legal and the other a trust estate;" and that the estate of Fred H. Vogt is equitable while that of the daughter is legal.

The rule is correctly stated; are the estates of different nature or quality?

To determine this question, we must ascertain what quality of estate Fred H. Vogt, and his heir or heirs, respectively took at the decease of the testator; not, as argued by counsel for the infant, what will be the estate of the heirs at the death of the person having the life-interest. It seems to me that this view of the two estate- or interest- dispels all doubt. "Said share shall be paid to Charles Graff and Fred Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death." The trustees hold the legal title of the "share" from the death of the testator, to pay the income to Vogt and to hold the principal for his heirs, to be paid over on
19 Vogt's death. Surely Vogt's interest is equitable; can any other definition of the interest of the heirs *during Vogt's life* be given?

The precise question involved was decided by the supreme court of Illinois in the case of Glover *vs.* Condell, 163 Ill. 566. Quoting from page 588:

"But personal property is not within the statute of uses. In the case at bar, the trustees were to hold the proceeds of sale—the money or securities representing two-thirds of Albert's share—during his life and invest the same and pay him the interest during his life, so that the trust was an active one and his estate was equitable. At his death the principal of the share is to be paid to his heirs, and so, for the purpose of turning the share over to the heirs by payment, or delivery, or assignment of securities, the legal title at his death still remain- in the trustees, and *until such payment*, delivery or assignment the estate of the heirs was equitable. In such cases the legal title remains in the trustee 'until the purposes of the trust are accomplished, and until the possession of the property is in some way transferred to the person entitled to the use, or the last use.' (1 Perry on Trusts,—3d ed.—secs. 311, 303; Kirkland *v.* Cox, 94 Ill. 400.) If therefore, in this case the original devise to the trustees of the fund to be invested for Albert during his life and to be paid to his heirs at his death, considered separately from the gift over to the children of the testator be construed by the application thereto of the principles involved in Shelly's case, it cannot be said, that the prior estate given for life to Albert, and the *subsequent estate to go to his heirs* are not both of the same quality."

The case of Warner *et al vs.* Sprigg *et al.*, 62 Md. 14 is very like the case at bar. There a testator directed that his whole estate, real, personal and mixed, should be divided by three trustees into five equal parts, two of which should go to his daughter and the other three to his two sons. The three trustees were to hold in trust for his three children, according to their respective shares, permitting the children to receive the rents and income thereof The will then proceeded: "After the death of my said sons respectively, their shares to go to their several heirs-at-law." It was held that while as to the

real estate, the trust declared by said will (the same involving no powers or duties in the trustees,) was, by force of the statute of uses, executed in the children of the testator, who took thereby legal estates under the will. But it was also held as to the personal estate that the bequest carried the legal estate to the trustees and that, by analogy to the rule in Shelly's case, the clause giving their shares after their decease to their several "heirs at law," gave them the absolute equitable interest.

I am unable to see any distinction between the facts of that case and those in the case at bar.

It is further contended by counsel for the infant that not only is there a difference in the *quality* of the estates of her father and herself, but that the bequest is of different *property*, the father getting the *income* of the fund, while the *fund* itself goes to the heir.

After careful study I have been unable to see any force in this contention. The language of the will is that "All the rest and residue of my estate * * * be sold * * * the proceeds of said sale shall be then divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the *share* coming to my son, Fred H. Vogt. *Said share* shall be paid to * * * as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid his heirs after his death." Surely this creates a trust of Fred H. Vogt's "share" for his use during his life. Assuming the remainder over was valid, can it be seriously contended that the *property* in which Vogt has an equitable interest for life is not the same property bequeathed absolutely to his heirs after his death?

For these reasons, I will sign a decree construing the will as bequeathing to Fred H. Vogt his share absolutely.

ASHLEY M. GOULD, *Justice.*

Decree Construing Will.

Filed Jan. 5, 1905.

In the Supreme Court of the District of Columbia.

Equity. No. 23547.

SOPHIA VOGT ET AL.
vs.
CHARLES GRAFF ET AL.

This cause came on to be heard upon the pleadings herein for the construction of the last will and testament of John L. Vogt, deceased, and having been fully argued by counsel for the respective parties in interest, and duly considered, it is thereupon by the court this fifth day of January, 1905, adjudged, ordered and decreed as follows, viz:

1st. That the testator, John L. Vogt, deceased, in the residuary clause of tenth paragraph of his last will converts the real estate therein devised to his heirs into personalty.

2nd. That the complainant, Frederick H. Vogt, takes a one-fifth interest in the residuary fund devised in the tenth paragraph of said will absolutely.

3rd. That it appearing to the court that all parties in interest except the infant defendant Mathilde Vogt, whom the court hereby decides has no interest, have decided to take the real estate instead of the proceeds of a sale thereof, it is hereby further adjudged, ordered and decreed that the trustees heretofore appointed by this court in the place and stead of the defendants, Graff and Gieseking, be and they hereby are discharged; and that the real estate devised under the tenth paragraph or residuary clause of said will be, and the same hereby is, vested in Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand and Leo J. Vogt, their heirs and assigns in fee simple as tenants in common. And from this decree the infant defendant Mathilde Vogt appeals to the Court of Appeals D. C. and the bond on such appeal is fixed at one hundred dollars for costs.

ASHLEY M. GOULD, *Justice.*

21 *Mandate.*

Filed December 31, 1906.

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

Whereas, lately in the Supreme Court of the District of Columbia, before you, or some of you, in a cause between Sophia Vogt, Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand, Leo J. Vogt, complainants, and Charles Graff, Frederick C. Gieseking, and Matilda S. Vogt, defendants, Equity No. 23,547, wherein the decree of the said Supreme Court entered in said cause on the 5th day of January, A. D. 1905, is in the following words, viz:

"This cause came on to be heard upon the pleadings herein for the construction of the last will and testament of John L. Vogt, deceased, and having been fully argued by counsel for the respective parties in interest, and duly considered, it is thereupon by the court this fifth day of January 1905, adjudged, ordered and decreed as follows, viz:

1st. That the testator, John L. Vogt, deceased, in the residuary clause of tenth paragraph of his last will converts the real estate therein devised to his heirs into personalty.

22 2nd. That the complainant, Frederick H. Vogt takes a one-fifth interest in the residuary fund devised in the tenth paragraph of said will absolutely.

3rd. That it appearing to the court that all parties in interest except the infant defendant Mathilde Vogt, whom the court hereby decides has no interest, have decided to take the real estate instead of the proceeds of a sale thereof, it is hereby further adjudged, ordered and decreed that the trustees heretofore appointed by this court in the place and stead of the defendants, Graff and Gieseking, be and they hereby are discharged; and that the real estate devised under the tenth paragraph or residuary clause of said will be, and the same hereby is, vested in Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand and Leo J. Vogt, their heirs and assigns in fee simple as tenants in common. And from this decree the infant defendant Mathilde Vogt appeals to the Court of Appeals D. C. and the bond on such appeal is fixed at one hundred dollars for costs.

ASHLEY M. GOULD, *Justice.*"

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, aggre-ably to the Act of Congress in such case made and provided, fully and at
23 large appears taken by Mathilda S. Vogt, by her guardian *ad litem* Pauline Vogt, whereon Sophia Vogt, Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand, Leo J. Vogt, Charles Graff and Frederick C. Gieseking were made the parties appellees agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the terms of April, in the year of our Lord one thousand nine hundred and five, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby reversed with costs and that the said Matilda S. Vogt, by her guardian *ad litem* Pauline Vogt recover against the said Sophia Vogt, Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand, Leo J. Vogt, Charles Graff and Frederick C. Gieseking Forty three dollars and ten cents for her costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

JUNE 13, 1905.

And whereas, said cause was removed to the Supreme Court of the United States by virtue of an appeal taken by Frederick H. Vogt, agreeably to the Act of Congress in such case made and
24 provided:

And whereas at the October Term, A. D. 1906, of said Supreme Court of the United States the following decree was entered, viz:

"It is now here ordered, adjudged and decreed by this Court that

this appeal be, and the same is hereby, dismissed for the want of jurisdiction.

OCTOBER 19, 1906."

as by the inspection of the Mandate of the said Supreme Court of the United States fully and at large appears.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 31st day of December in the year of our Lord one thousand nine hundred and six.

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Costs of Matilda S. Vogt.

Clerk	$10.60
Attorney	5.00
Printing Record	27.50
	$43.10
Record	9.35

25 *Final Decree.*

Filed March 1, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 23547.

SOPHIA VOGT ET AL., Complainants,
vs.
CHARLES GRAFF ET AL., Defendants.

Upon presentation of the mandate of the Court of Appeals of the District of Columbia, filed herein on the 31st day of January, 1906, and upon consideration of the pleadings and former decrees herein, and it appearing therefrom that all the matters in controversy, with the exception of the construction of the residuary clause, or tenth paragraph, of the last will and testament of John L. Vogt, deceased, were adjudicated prior to the fifth day of January, 1905 and it further appearing from the record in the case that on the said 5th day of January, 1905, a final decree was entered in the cause construing said paragraph of said will, from which an appeal was duly entered by defendant, Matilda S. Vogt, by her guardian *ad litem*, Pauline Vogt, to the Court of Appeals of the District of Columbia; and there now being presented to this court the said mandate of the Court of Appeals of the District of Columbia, and upon consideration thereof, and after hearing counsel for the respective parties in inter-

est, it is by the court this 1st day of March, 1909, Adjudged,
26 Ordered and Decreed that the decree entered in this cause on the 5th day of January, 1905, be and the same hereby is vacated and set aside.

And in conformity with said mandate it is further Adjudged, Ordered and Decreed that in and by the tenth paragraph of the last will and testament of John L. Vogt, deceased, the complainant Frederick H. Vogt, takes only an equitable interest for life in and to the income to be derived from the proceeds of the real estate, which are thereby directed to be paid to Charles Graff and Frederick C. Gieseking, as trustee; and upon the death of the said Frederick H. Vogt, the principal of such proceeds is bequeathed to his children, or next of kin.

JOB BARNARD, *Justice.*

From this decree an appeal is taken by the complainant, Fred H. Vogt, in open court to the Court of Appeals, and bond for costs is hereby fixed at $100.

JOB BARNARD, *Justice.*

Order for Severance on Appeal.

Filed March 1, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 23547.

VOGT ET AL., Complainants,
vs.
GRAFF ET AL., Defendants.

It is by the court this 1st day of March, 1909, Ordered
27 that the complainant, Fred H. Vogt, be and hereby is, granted a severance from the other complainants herein on appeal from the decree passed herein on the 1st day of March, 1909.

JOB BARNARD, *Justice.*

Memorandum.

March 12, 1909.—Appeal bond filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed March 20, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 23547.

SOPHIA VOGT ET AL., Complainants,
vs.
CHARLES GRAFF ET AL., Defendants.

The Clerk of the Court will please prepare the record for the appeal herein taken by the complainant Frederick H. Vogt and include the following:

28 Bill filed October 3, 1902, Exhibit No. 1.
Answer of the defendant Matilda S. Vogt, filed January 27, 1903.
Opinion of Mr. Justice Gould, filed December 13, 1904.
Decree construing will, filed January 5, 1905.
Mandate of the Court of Appeals, filed ——.
Final Decree filed March 1st, 1909.
Order of severance, filed Mch 1, 1909.
Memorandum of bond, filed —— —, 1909.
Memorandum of this order.

JOHN C. GITTINGS,
Solicitor for Appellant, Frederick H. Vogt.

Leon Tobriner, Esq., Solicitor for Matilda S. Vogt.

SIR: The above is a designation of the papers deemed necessary for the proper determination of the case on appeal. If there are any additions that you desire made to the record will you kindly notify the Clerk within ten days.

JOHN C. GITTINGS,
Solicitor for Appellant, Frederick H. Vogt.

O. K.
LEON TOBRINER,
Sol'c't'r, G'd'n ad Litem.

29 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 23547 Equity, wherein Sophia Vogt, *et al.* are Complainants and Charles Graff, *et al.* are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 6th day of April A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 2009. Frederick H. Vogt, appellant, *vs.* Charles Graff *et al.* Court of Appeals, District of Columbia. Filed Apr. 16, 1909. Henry W. Hodges, clerk.

TUESDAY, *May 4th, A. D.* 1909.

No. 2009.

FREDERICK H. VOGT, Appellant,
vs.
CHARLES GRAFF, FREDERICK C. GIESEKING, and MATILDA S. VOGT.

The above entitled cause was submitted to the consideration of the Court on the printed record filed herein by Mr. J. C. Gittings, attorney for the appellant, and by Messrs. Leon Tobriner and J. J. Darlington, attorneys for the appellees.

No. 2009.

FREDERICK H. VOGT, Appellant,
vs.
CHARLES GRAFF, FREDERICK C. GIESEKING, and MATILDA S. VOGT.

Opinion.

Mr. Chief Justice Shepard delivered the opinion of the Court:

This case involving the construction of the will of John L. Vogt is before us for the second time on appeal. The decree of the Court below was reversed on the first appeal and the cause remanded for further proceedings in accordance with the opinion then delivered. Vogt vs. Vogt, 26 App. D. C. 46. An appeal prosecuted therefrom to the Supreme Court of the United States was dismissed because the decree was not final. 203 U. S. 581. The cause was then returned to the Court below, and on March 1, 1909, a final decree was rendered, from which this appeal has been prosecuted.

As that decree was entered in conformity with the opinion and mandate of this Court, it will be affirmed with costs.

No. 1520.

MATILDA S. VOGT, by Her Guardian ad Litem, PAULINE VOGT, Appellant,
vs.
SOPHIA VOGT, FREDERICK H. VOGT, OSCAR G. VOGT, CLIFFORD F. Vogt, Bertha Vogt Brand, Leo J. Vogt, Charles Graff, and Frederick C. Gieseking.

Opinion.

Mr. Chief Justice Shepard delivered the opinion of the Court:

The bill in this case was filed by certain of the children of John L. Vogt to obtain a construction of the latter's will, and for some other purposes which it seems have been accomplished by settlement or otherwise and need not be mentioned.

The defendants are Charles Graff and Frederick C. Gieseking, executors and trustees named in said will, and Matilda S. Vogt, the infant daughter of one of the complainants, Frederick H. Vogt.

The testator, John L. Vogt, died seized and possessed of a large estate. After certain specific devises and bequests the following disposition was made of the residue: "All the rest and residue of my real estate shall, when my youngest surviving child attains the age of 21 years, or one year thereafter in the discretion of my executors, be sold by my executors at public auction, after due notice in the newspapers of this city. The proceeds of said sales shall be then divided among my heirs, share and share alike, and paid over to them respectively at once, except the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick C. Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death." The single controversy is over the construction of this provision, and is between Frederick H. Vogt and his infant child, Matilda S. Vogt. The question is whether the former takes the absolute estate, or only the income thereof for life with remainder to his said daughter. The decree of the equity court sustained the contention of the father, and has been appealed from by the daughter.

The contention on behalf of Fred H. Vogt that he took an absolute estate under the residuary clause of the will aforesaid rests on the application to its provisions of the rule in Shelly's case. That famous rule has been defined and elucidated by Chief Justice Alvey, speaking for this court in Sims v. Georgetown College, 1 App. D. C. 72, 79, in the following words: "Where, in the same instrument, the ancestor takes an estate of freehold, with remainder mediately or immediately to his heirs, the word heirs is a word of limitation of the estate, and not of purchase; or in other words, that such remainder vests in the ancestor himself, and the heirs when they take, take by descent from him, and not as purchasers from the grantor or devisor. Thus, if the limitation be to his heirs in general a fee simple is given to the ancestor; if to the heirs of his body, he takes a fee tail, according to the common law. * * * And the rule is equally applicable to the limitations of equitable as to legal estates; but the estate of the ancestor and the limitation to the heirs must be of the same quality, that is, both must be legal or both equitable. The same words that create an estate in fee simple or an estate in fee tail in legal estates, will, when applied to an equitable estate create an estate in fee simple or in fee tail in that estate." See, also, Green v. Green, 23 Wall. 486, 488; Croxall v. Sherred, 5 Wall. 268, 282.

There can be no doubt that the real intention of the testator was that Fred H. Vogt should take nothing more than a life estate in the designated share; that is, the income thereof during his life, and that the same should then pass into the possession and enjoyment of his children or next of kin; and the question is whether the expression of this intention is so inconsistent with the aforesaid rule as to be completely thwarted thereby? The real estate having been directed to be converted into money is to be regarded as if it were

money at the time of the testator's death. Cropley v. Cooper, 19 Wall. 167, 174. Both parties concur in this view.

While the rule in Shelly's case is perhaps a logical result of the ancient doctrine of feudal tenure, and is, therefore, peculiarly applicable in the construction of grants and devises of land, it may be assumed, also, for present purposes, but without expressly so deciding, that it is equally applicable to grants and bequests of personal property. Under the statement of the rule, as we have seen, in order that the two estates attempted to be created shall coalesce, they must be of the same quality; that is, both must be legal or both equitable. If the one be equitable and the other legal the rule will not apply.

The life estate here being equitable, the application turns upon the contention of the appellees that the estate in remainder is likewise an equitable one.

The remainder is a vested one, because a present interest, though to be enjoyed in futuro, passes under the will to a certain and definite person. Poor v. Considine, 6 Wall. 458, 474. In the same case it is said: "It is a rule of law that estates shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary." And the rule is the same where the subject-matter is personal property. Gibbens v. Gibbens, 140 Mass. 102, 105.

Bearing this in mind, we are of opinion that the appellees' contention must be denied. The devise or bequest to the trustees was to them without the addition of their heirs, etc., and their active duties were expressly limited to the life of Fred H. Vogt. Had there been no conversion of the devised estate into personalty, the vested remainder would be a legal estate, because the use would be executed in the heirs. Ware v. Richardson, 3 Md. 505; Green v. Green, 23 Wall. 486, 491; Croxall v. Sherred, 5 Wall. 268, 282.

It may be conceded that the Statute of Uses, in force in Maryland and the District of Columbia, does not operate in the case of personal property. But a like result is accomplished by another well-established principle, namely, that a trust estate is not to continue beyond the period required by the purposes of the trust. Poor v. Considine, 6 Wall. 458, 471. As said in that case by Mr. Justice Swayne: "This doctrine rests upon a solid foundation of reason and authority, irrespective of the presence or absence of the Statute of Uses." See also Young v. Bradley, 101 U. S. 782, 787; Potter v. Couch, 141 U. S. 296, 309; Wilkes v. Wilkes, 18 App. D. C. 90, 96; Smith v. Sullivan, 20 App. D. C. 553, 557; Long v. Long, 62 Md. 33, 64, 66. In the case last cited it was said by Chief Justice Alvey, who delivered the opinion of the court: "And in regard to personalty, the principle is, that when a trust has been created, and all purposes of the trust have ceased, or at an end, the absolute estate is in the person entitled to the last use, unless there is an apparent intention to the contrary." See, also, Denton v. Denton, 17 Md. 407; Owen v. Crow, 62 Md. 491, 494; Hooper v. Falgner, 80 Md. 262, 272; Mercer v. Safe Dep. Co., 91 Md. 102, 117; Bacon's Appeal, 57 Pa. St. 504, 514.

Instead of there being "an apparent intention to the contrary" in this case, the testator expressly limited the trust to the life estate.

No exercise of discretion is required of the trustees thereafter; they are not even required to make partition. Their active duties cease with the life of Fred H. Vogt. The trust is ended thereby, and all that they are required to do is to pay over the principal at once.

The trust being expressly limited to the life estate of Fred H. Vogt, the remainder to the heirs is a legal estate, and hence there can be no union of the two estates under the rule in Shelly's case.

Bacon's appeal, supra, is directly in point. Both real and personal property were vested in trustees by the will, the income thereof payable to a daughter during life, if she died leaving a husband income to him for life, and from and after the decease of the daughter and her husband, respectively, her share to " go to her right heirs forever." It was held that the life estate being equitable and the remainder legal, there was no merger.

Mr. Justice Strong, delivering the opinion of the court, said: "The cestui que trust being entitled to the whole beneficial enjoyment, and the trustees having no right to interfere with it, no reason is apparent why a legal title should be held continuing in the latter. A severance of the legal right from the beneficial ownership is not to be maintained without some reason. In the case before us the purpose of the trust was accomplished when Mrs. Bacon died. The testator did not intend that the trustees should hold any estate after her death. He contemplated its immediate transmission to the remaindermen, a transmission by conveyance, indeed, but no holding in trust for those in remainder. There was, therefore, nothing substantial to be secured by treating the legal estate as remaining in the trustees, and only an equitable interest in Mrs. Bacon's heirs. * * * The direction to the trustees to convey after the termination of the trust does not continue the legal title in them and make them trustees of the persons to whom they are directed to convey." The foregoing had application to the real estate, but it was also said that the same rule applied in the case of the personal property under the same trust. To the same effect, Mannerback's Estate, 133 Pa. St. 342, 350.

Thus far we have dealt with the case upon the lines chiefly pursued in the argument before us. But we think that the decision can be rested upon another ground, the consumption of space in the statement of which is justified by the importance of the case.

The subject-matter involved is personal property, and as we have before said the rule in Shelly's case is peculiarly applicable to grants and devises of real estate. Daniel v. Wharteney, 17 Wall. 639, 642; 4 Kent. 216. Assuming that it also applies to personal property, yet the courts, guided by the cardinal principle that the intention of the testator shall govern where possible, have always been more anxious to support limitations of personal property than of realty. Bacon's Appeal, 57 Pa. St. 504, 514.

As has been said before, no one can doubt what the real intention of the testator was in making this will. Now, while the intention will be unavailing, especially in the case of real property, to exclude the application of the rule where the technical language used is directly within its application, still, "if there are explanatory and

qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield, and the latter must prevail. The rule is one of property and not of construction." Daniel v. Whartenev, 17 Wall. 639, 643. The tendency has always been, and is now more marked than ever, to deny the application of the rule "where the intent of the testator has been made to appear so plainly to the contrary that no one could misunderstand it." Poole v. Poole, 3 Bos. & Pul. 627; Featherston v. Featherston, 3 Cl. & Fin. 67, cases cited and quoted from in Sims v. Georgetown College, 1 App. D. C. p. 81. The word share as used in the clause under consideration is a mere designation of the ratio of division in order to make the same certain. The shares, in that sense, of the remaining children are to be divided among and paid over to them immediately upon the actual conversion of the lands into money; while in the case of Fred H. Vogt, not the share but the income thereof only is to be paid to him during his life. The share is never to come into his possession at all. In directing the principal to be paid over after the death of Fred H. Vogt, had the testator used the appropriate words, children, or next of kin, or the like, instead of heirs, this controversy might have been avoided. Most likely, the testator had no apprehension of the conversion worked by his positive direction to sell the real estate; and had there been no conversion, the word "heirs," commonly understood by persons, like him unlearned in the law, as meaning those who take both real and personal estate in case of intestacy, would be the appropriate one. In that event, as we have seen, the use would have been executed in the heirs, and their estate in remainder would be a legal one which would not coalesce with the equitable life estate. As there was an equitable conversion, however, and in view of the plain intention of the testator we are of the opinion that the word "heirs" must be construed as meaning children or next of kin, or those who would take as distributees under the statute. "When the word heir is used in gifts of personalty it should primarily be held to refer to those who would be entitled to take under the statute of distributions." Sweet v. Dutton, 109 Mass. 589, 591, and cases therein cited. See, also, Tillman v. Davis, 95 N. Y. 17, 24; Johnson v. K. of H. 53 Ark. 255, 260; Ashton's Estate, 134 Pa. St. 390, 395; Evans' Estate, 155 Pa. St. 646, 649; Schouler on Wills, section 542.

By taking this view effect is given to the manifest intention of the testator, a result which all courts seek to accomplish if possible.

The decree will be reversed, with costs, and the cause remanded for further proceedings not inconsistent with the foregoing opinion. It is so ordered.

Reversed.

April Term, 1909.

No. 2009.

FREDERICK H. VOGT, Appellant,
vs.
CHARLES GRAFF, FREDERICK C. GIESEKING, and MATILDA S. VOGT.

Appeal from the Supreme Court of the District of Columbia.

WEDNESDAY, *May 5th, A. D.* 1909.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD,
May 5, 1909.

No. 2009.

FREDERICK H. VOGT, Appellant,
vs.
CHARLES GRAFF, FREDERICK C. GIESEKING, and MATILDA S. VOGT.

TUESDAY, *May 11th, A. D.* 1909.

On motion of Mr. J. C. Gittings, attorney for the appellant in the above entitled cause, It is ordered by the Court that said appellant be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars.

(*Bond on Appeal.*)

Know all men by these presents, That we, Frederick H. Vogt, as principal, and R. E. Johnston, as surety, are held and firmly bound unto Charles Graff, Frederick C. Gieseking and Matilda S. Vogt in the full and just sum of Three hundred dollars, to be paid to the said Charles Graff, Frederick C. Gieseking and Matilda S. Vogt, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Sophia Vogt, et al. vs. Charles Graff et al. a decree was rendered against the said Frederick H. Vogt and the said Frederick H. Vogt having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Charles Graff, Frederick C. Gieseking and Matilda Vogt citing and

admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Frederick H. Vogt shall prosecute said appeal to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FRED. H. VOGT. [SEAL.]
R. E. JOHNSTON. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of—

——— ———.
——— ———.

Approved by:
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 2009. Frederick H. Vogt, Appellant, vs. Charles Graff et al. Bond for Costs on Appeal to Supreme Court. U. S. Court of Appeals, District of Columbia. Filed Jun- 1, 1909. Henry W. Hodges, Clerk.

I have no objections to the surety within.
LEON TOBRINER,
For Matilda S. Vogt.

UNITED STATES OF AMERICA, *ss:*

To Charles Graff, Frederick C. Gieseking, and Matilda S. Vogt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Frederick H. Vogt is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 1st day of June, in the year of our Lord one thousand nine hundred —.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service accepted this 1st day of June, A. D. 1909.
LEON TOBRINER,
For Matilda S. Vogt.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun 1, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 34, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Frederick H. Vogt, Appellant, vs. Charles Graff, Frederick C. Gieseking and Matilda S. Vogt, No. 2009, April Term, 1909, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 2d day of June A. D. 1909.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 21,730. District of Columbia Court of Appeals. Term No. 73. Frederick H. Vogt, appellant, vs. Charles Graff, Frederick C. Gieseking, and Matilda S. Vogt. Filed June 17th, 1909. File No. 21,730.

SUPREME COURT OF THE UNITED STATES

October Term, 1913.

No. 73.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 73.

FREDERICK H. VOGT, APPELLANT,

vs.

CHARLES GRAFF, FREDERICK C. GIESEKING, AND MATILDA S. VOGT.

BRIEF ON BEHALF OF APPELLANT.

Statement of Case.

The bill of complaint in this cause was filed by Sophia Vogt, the widow, and Frederick H. Vogt, Oscar G. Vogt, Clifford F. Vogt, Bertha Vogt Brand, and Leo J. Vogt, the only children and heirs-at-law of John L. Vogt, deceased, against Graff and Gieseking, the executors and trustees under the will of the said deceased; and Mathilda S. Vogt, an infant granddaughter of the deceased and only child of Fred. H. Vogt, for the purpose of obtaining, among other things, a construction of the last will and testament of the said John L. Vogt, who died on August 8, 1894, in the District of Columbia, leaving an estate consisting of personal property and realty to the value of about $500,000.

By certain orders and decrees of the Supreme Court of the District of Columbia, passed by consent of all the parties in interest, all matters in dispute were determined except the

proper construction of the tenth paragraph, or clause, of the will of the said John L. Vogt, deceased, which is in the following language:

> "All the rest and residue of my estate shall, when my youngest surviving child attains the age of twenty-one years or one year thereafter in the discretion of my executors, be sold by my executors at public auction after notice in the newspapers of this city. The proceeds of said sale shall then be divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son Fred. H. Vogt. Said share shall be paid to Charles Graff and Fred Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred. H. Vogt, the principal to be paid his heirs after his death."

The only controversy over this provision was between Frederick H. Vogt, appellant, and Mathilda S. Vogt, his infant daughter, the former contending that by virtue of the "Rule in Shelly's Case" he took the one-fifth interest in the residuary funds created by the 10th paragraph of the will, absolutely. On the other hand, in behalf of the infant, Mathilda S. Vogt, it was contended that appellant took only the income from the one-fifth interest for life, the principal going to his heirs upon his death. This controversy was decided by the decree of January 5, 1905, of the Supreme Court of the District of Columbia, passed by Mr. Justice Gould, which said:

> "The complainant, Frederick H. Vogt, takes a one-fifth interest in the residuary funds devised in the 10th paragraph of said will absolutely" (Rec., p. 21).

The opinion of Mr. Justice Gould will be found in the Record, pp. 17-20.

The infant Mathilda S. Vogt, noted an appeal to the Court of Appeals of the District of Columbia. When the cause came

on for hearing in that court the following propositions of law, as determined by Mr. Justice Gould, were conceded by counsel for both parties to be correct:

1st. That under the devise in the case at bar there is an equitable conversion of the real estate, and we are now dealing with personal property.

2d. That the "Rule in Shelly's Case" is applicable to personal property, and that the same principles are applied by analogy and to the same extent.

3d. That the "Rule in Shelly's Case" is not a rule of construction but a positive rule of law that must be applied whenever applicable, notwithstanding a testator's intention to the contrary.

4th. That before the "Rule in Shelly's Case" can be applied, the estate of the ancestor and the estate of the heir must be of the same quality, both legal or both equitable.

Therefore the only question left to the Court of Appeals for determination was whether under the language of the will the "Rule in Shelly's Case" applied.

The infant Mathilda Vogt contended in this connection:

1st. That the estate bequeathed to the appellant is of a different quality or nature from that bequeathed to his heirs.

2d. That by a proper interpretation of that clause of the will that directs *"the principal to be paid to his heirs after his death,"* the word *"heirs"* is to be construed as children or next of kin.

On June 13, 1905, the Court of Appeals reversed the decree of Mr. Justice Gould and remanded the cause for further proceedings not inconsistent with its opinion. The opinion is by the Chief Justice and in substance determines that Fred. H. Vogt's contention must be denied on three grounds, viz:

1st. Because the remainder devised to the heirs of Frederick H. Vogt is a vested one.

2d. Because the trust estate is expressly limited to the life of Frederick H. Vogt; consequently the remainder to

the heirs is a legal estate and hence there can be no union of the two estates under the "Rule in Shelly's Case."

3d. Because the subject-matter involved is personal property only, and as the "Rule in Shelly's Case" is peculiarly applicable to devises of real estate, assuming that it also applies to personal property, *but without expressly so deciding, yet the courts, guided by the cardinal principle that the intention of the testator shall govern where possible, have always been more anxious to support limitations of personal property than of realty.* Consequently, the testator having used the word *"heirs"* instead of the appropriate words *"children"* or *"next of kin"* or the like, the word *"heirs"* is to be construed as meaning *"children"* or *"next of kin"* or those who would take as *"distributees under the statute."*

From the decree of the Court of Appeals an appeal was prosecuted to this court which was subsequently dismissed because the decree was not final (203 U. S., p. 581). The cause was then returned to the court below and remanded to the Supreme Court of the District of Columbia, where, on March 1, 1909, a final decree was rendered (Rec., pp. 23-24); and an appeal therefrom was taken to the Court of Appeals of the District of Columbia, where, on May 5, 1909, it was affirmed (R., p. 31), and from that decree an appeal was allowed to this court.

Assignments of Error.

1st. The court below erred in holding that the "Rule in Shelly's Case" was not applicable.

2d. The court below erred in holding that the following language of the devise, namely:

> "Said share shall be paid to Graff and Geiseking as trustees, by them invested, the income therefrom to be paid said Fred. H. Vogt, the principal to be paid to his heirs after his death,"

created a vested remainder in the heirs of Fred. H. Vogt during his lifetime, *"because a present interest, though to be enjoyed in future, passed under the will to a certain and definite person."*

3d. The court below erred in holding that, as to the trustees—

> "Their active duties ceased with the life of Fred. H. Vogt. The trust is ended thereby, and all they are required to do is to pay over the principal at once * * * The trust being expressly limited to the life estate of Fred. H. Vogt, the remainder to the heirs is a legal estate, and hence there can be no union of the two estates under the 'Rule in Shelly's Case'" (Rec., 25).

4th. The court below erred in holding that the testator did not use the word "heirs" in the tenth paragraph of the will in its primary legal technical sense, that is as a word of limitation.

5th. The court below erred in holding that there were explanatory, or qualifying words, or expressions, in the will from which it appears that the import of the technical language used is contrary to testator's intention.

6th. The court below erred in reversing the decree of the Supreme Court of the District of Columbia of January 5th, 1905, passed by Mr. Justice Gould, which determined that appellant took the one-fifth interest in the fund created by the tenth paragraph of the will of John L. Vogt, deceased, absolutely.

ARGUMENT.

I.

The "Rule in Shelly's Case" is Applicable to Personal Property.

Until the court below rendered the decision in this case, it was conceded to have been settled by law in this jurisdiction that the "Rule in Shelly's Case" was applicable to personal property.

As early as the year 1755, Hardwick, Lord Chancellor, in the case of Garth *vs.* Baldwin, decided that a devise of personalty in trust for "B" for life, and afterwards for the heirs of his body, would give "B" the property absolutely, saying:

> "It is a limitation of personal estate to one for life and the heirs of his body, which vests absolutely, whether so intended or not."
> 2 Vesey Sr., Ch. Rep., 636.

In Horne *vs.* Lyeth, 4th Harris and Johnson, page 435, Mr. Chief Justice Dorsey held that Garth *vs.* Baldwin (*supra*) was binding authority, and that authority has ever since been followed in the Maryland courts. The two following cases are in point and were decided by the Court of Appeals of Maryland when Alvey, late Chief Justice of the court below, was a member of that court, viz., Warner *vs.* Sprigg, 62 Md., 14, and Hughes *vs.* Nicklas, 70 Md., 482.

The Supreme Court of the District of Columbia was confronted with the same proposition of law in the case of Engle *vs.* Mades, 25 Wash. Law Rep., 220, and the late Justice Cox, in an exhaustive review of all the authorities upon the point, held that Garth *vs.* Baldwin (*supra*), Butterfield *vs.* Butterfield, 1 Vesey Sr., Ch. Rep., 154, and Horne *vs.* Lyeth (*supra*) were, beyond question, the law of this jurisdiction.

However, Mr. Chief Justice Alvey leaves no room for doubt as to the rule being an absolute rule of law in the District of Columbia.

In the case of Simms *vs.* Georgetown College, he said:

> "The 'Rule in Shelly's Case' has not met with favor in some of the States in our Union, and it has been, in those States, either qualified or entirely abrogated by legislative enactment. In Maryland the rule has been in full force and operation from the early settlement of the colony, as a rule of property; and as the laws of that State, as they existed on the 27th day of February, 1801, were continued in force over the District, except where they were, or might, thereafter become inconsistent or in conflict with the legislation of Congress, the 'Rule in Shelly's Case' is a part of the common law of this District, and while not disposed to enlarge or give the rule any new application this court has no power whatever to depart from the rule, or in the least to restrict its application. To do so would be to disrupt the ligaments of title, and to introduce confusion, where for the good of the community quiet and repose should be maintained."
>
> 1 D. C. App., 79, 80.

If the rule has any application to personal property at all, and under the aforegoing authorities I take it there can be no reasonable doubt on the point, it has the same force and effect as when applied to real estate. If applied by analogy, it must be applied, of course under the same circumstances and conditions; consequently it is a rule of law and not a rule of construction.

Being a rule of law, it is inflexible and will necessarily override any intention of a testator to the contrary in those cases where it is applicable. Hardwick, L. C., in Garth *vs.* Baldwin (*supra*) says it will operate to vest the personal estate in the ancestor absolutely, "whether so intended or not." To the same import is Horne *vs.* Lyeth (*supra*).

Then upon what authority can it be said that the "Rule

in Shelly's Case" will give way more readily to the testator's intention when applicable to personal property? There is not a case that can be found in the books that treat it (that is, in any State where it is a rule of law) any differently when applied to personalty than when applied to real estate. There may be, and no doubt are, a class of cases involving executory trusts where courts have not applied the rule. But in the case at bar, by no possible torture of the testator's language, can it be construed to read as an *executory trust*.

As said by this court in Neves *vs.* Scott, 9 Howard (50th U. S.), p. 211:

> "A trust executed is where the party has given complete directions for settling his estate, with perfect limitations; an executory trust is where the directions are incomplete and are rather minutes or directions for a settlement."

An apt illustration of the distinctions between an executed and an executory trust is contained in Underhill, on the law of wills, where the authors say:

> "The distinction between executory and executed trusts is approximately illustrated by the analogous case of the general instructions given by a testator to his professional adviser for the drafting of his will, and the will when it is completed. The testator may employ the ordinary non-technical language of the layman who is not conversant with legal phraseology, and may depend upon the draftsman to state his intention formally and technically. The draftsman, like the court of equity in construing an executory trust, understands thoroughly the testator's intention, though it has been stated in terms which, taken in their strict sense, convey an entirely different meaning. It is then the duty of the draftsman to disregard the particular language of the testator, and so frame the will in appropriate and technical terms that the real, and not the apparent, intention of the testator may be carried out." Vol. 2, p. 898.

That a mere direction to convey the legal title or to pay over a fund, where the limitations of the trust are complete, does not alone make a trust executory, is well settled in law, both in this country and in England. See

Rowan *vs.* Chase, 94 U. S., 818.
Cushing *vs.* Blake, 30 N. J. Eq., 689, 670.
Edgerton *vs.* Lord Brownlaw, 4 H. L. C., 1210.

It is well settled from the very earliest times that the "Rule in Shelly's Case" must be applied in a court of equity to the same extent as in courts of law, when the trust estate is executed.

Preston on Estates, 362.
Ferne on Remainders, 157.
Bale *vs.* Coleman, 1 P. Williams, 142.
Simms *vs.* Georgetown College (*supra*).

The very moment we attempt to treat the "Rule in Shelly's Case" as subservient to a testator's intention, we absolutely efface and obliterate it as a rule of law, and turn it into a mere rule of construction. If this can be done when the subject-matter is personalty, what analogy is there in its application to real estate? None.

We find every court that has found the rule applicable to the particular case in hand applying it not as a rule of construction subservient to the testator's intention, but in the manner of Lord Chancellor Hardwick in Garth *vs.* Baldwin (*supra*). Yet the court below says:

> "Assuming that it also applies to personal property, yet the courts, guided by the cardinal principle that the intention of the testator shall govern *where possible,* have always been more anxious to support limitations of personal property than of realty." R., p. 29.

"Where possible" is the language of the court. Is it possible in any case if the testator's intention conflicts with the

"rule"? For authority for its decision the court below cites a case *long since overruled on every point upon which it was decided,* viz., Bacon's Appeal, 57 Pa. St., 504-514.

For a great number of years the Pennsylvania courts lost sight of the fact that "the Rule in Shelly's Case" was a positive rule of law, and not one of construction. Such was the doctrine of the courts of that State at the time of the decisions in the cases of Bacon's Appeal, 47 Pa., and Manner-back's Estate, 133 Pa. State, and they did not come back to this well-settled doctrine until 1895, when in the case of Grimes *vs.* Shirk, 169 Pa., p. 174, they took occasion to *emphatically overrule all former decisions to the contrary.* The court says, at page 181:

> "So imperative is the rule that, though there be an express declaration that the ancestor shall have only a life estate, yet this expressed intention will not defeat its operation. *This principle has unfortunately been more than once overlooked, some cases regarding the rule as merely one of construction, yielding to the manifest intention of the testator.* * * * In Findley *vs.* Riddle, the court seemed to lean strongly against applying the rule when the *intention that the first taker should have only a life estate was perfectly plain.* But the Pennsylvania courts have since unhesitatingly applied the rule regardless of the intention, when the subsequent limitation was to heirs, *qua* heirs.
>
> "The proper rule or method of applying the rule in Shelly's case is said to be this: 'Interpret the deed or will, by the ordinary rules of construction, precisely as if this rule had no existence.' Then having ascertained the testator's intention, look at this rule and see whether such intention conflicts with it, if it does the rule must be applied, for it is absolute and has no exception."
>
> See also McCann *vs.* Berkley, 204 Pa., p. 214. Shopley *vs.* Deihl, 203 Pa., pp. 566-569.

Now how are we to gather the testator's intention? From what he says or from what we imagine he ought to have said? The rule of construction seems to be that if technical

words are used they must be given their primary legal meaning, unless there is something on the face of the will that shows not only that they were not so used by the testator, but will clearly show in what sense they were used. Daniel *vs.* Wharteney, 17 Wall., 643.

A very interesting and instructive case on this point is Van Grutten *vs.* Foxwell, reported in Appeal Cases, L. Rept. (1897), 658, where Lord Macnaghten said:

> "That decision as it seems to me (Jesson *vs.* Wright) starts with the principle that the Rule in Shelly's Case is a rule of law—'inflexible'—as it was termed by one of the noble lords who spoke in the subsequent case of Roddy *vs.* Fetzgerald (6 H. L. C., 879), operating—invariably, and, so to speak, automatically, whenever the limitations are such as to call for its application. Proceeding on that footing, this house had only to construe the words of the will according to the established rules of construction. The most important of these rules for the purpose in hand was stated by Lord Redesdale in the following words: 'The rule is' said his lordship, 'that technical words shall have their legal effect unless, from *subsequent inconsistent words*, it is very clear that the testator meant otherwise.' What is to be understood by 'otherwise' is shown, I think, by the last words of the passage in which the rule was repeated in Roddy *vs.* Fetzgerald. 'It is another and most important rule,' said Lord Wensleydale, 'in the construction of the words used in a will, that technical terms or words of known legal import should have their proper legal effect attributed to them, although the testator used inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, *and to show what that sense is.*" P. 672.

In the same case, at page 684, Lord Davey said:

> "My Lords, I feel very strongly the importance of adhering to the rule, that technical expressions and words of known legal import shall receive their

> ordinary legal meaning. The neglect of this rule, in my opinion tends to increase uncertainty in the construction of instruments, and to multiply the difficulties of those who have to advise upon them, and therefore to foster litigation. Instead of interpreting the words of the instrument, the court is too frequently invited to embark on a fruitless speculation as to the testator's intention. The testator may, no doubt, tell you that he uses any particular words in a sense of his own, or (as it has been said) makes his own dictionary; but he must do so in such a manner as to make it plain to the mind of the tribunal which has to construe the instrument, not only that the words are used in other than their ordinary legal signification, *but also in what sense they are used.*"

This brings us to consideration of the opinion of the court below upon the question of the testator's intention.

It will be seen by examination of the opinion of the Chief Justice of the court below, that although he quotes the rule of construction laid down by this court in Daniel *vs.* Whorteney (*supra*), he immediately thereafter ignores it.

There are no inconsistent words in that paragraph of the devise in question, and there is a total absence of any qualifying words in that or any other paragraph which shows or tends in any manner to show that the testator used the word "heirs" in the sense of "children."

The word "heirs" may or may not be appropriate; this would entirely depend upon the sense in which the testator used it. From the context of the will there is absolutely no ground for a court saying that the word "heirs" was not used by the testator in its primary technical sense. To do so would require the court to violate every rule or canon of construction which I have before, upon the authorities quoted, suggested as applicable. It cannot be done by interpreting the words of the will, but only by an overin-

dulgence in speculating upon the testator's intention and treating his language as unintelligible. This, I make bold to submit, would be, as Lord Davey has pointed out in Van Grutten *vs.* Foxwell (*supra*), "fostering litigation."

The court below makes this suggestion:

> "Most likely the testator had no apprehension of the conversion worked by his positive direction to sell the real estate, and had there been no conversion the word 'heirs,' commonly understood by persons like him, unlearned in the law, as meaning those who take both real and personal estate in case of intestacy, would be the appropriate one" (Rec., p. 30).

Yet in Van Grutten *vs.* Foxwell (*supra*), Lord Macnaghten said:

> "When you can give effect to every word, attributing to each expression its proper legal signification, and the result, though perhaps unexpected or unusual, is not irrational or absurd, I do not think you ought to approach the construction of the will with the idea the testator probably did not mean what he has said. 'The good sense of all these cases,' said Lord Thurlow, 'is to believe that where persons have expressed themselves right they knew what they meant.' If I may say so, I think that a wholesome rule, and a rule we ought to adopt in construing the will now before us" (p. 678).

Suppose, for the sake of illustration, that the testator was a layman and unlearned in the law, and used the word "heirs" under the impression that his previous directions to his executors had not worked a conversion. Could it be contended then for one moment that he did not use the word "heirs" in its primary legal signification, as a word of limitation? Why the learned Chief Justice himself says so. "Meaning those who take in case of intestacy," says the court below (Rec., p. 26). Then what is the logical con-

clusion that a court is necessarily driven to? Is it not that the "Rule in Shelly's Case" must apply? "The rule is inflexible, and works automatically," says Lord Macnaghten. "It is a positive rule of law, and all intention of a testator to the contrary cannot prevent its application when a case falls within its terms," says Mr. Chief Justice Alvey.

That John L. Vogt was a layman does not appear anywhere in the record, and whether he was learned in the law I do not know, as the record is silent upon that point, unless it be the will itself, which shows beyond question that it was prepared by one skilled in legal lore, and unquestionably knew the legal difference between the words "heirs" and "children." In paragraph 8 of the will the testator says:

> "I give and bequeath all the rest and residue of my personal estate equally among wife, Sophia, and *my children,* etc."

Paragraph 9 he says:

> "Until my youngest *child* shall have attained the age of 21 years, I direct my executors out of the residue of the income from my real estate to pay, 1st, to my wife $350 monthly. 2d, to my *grandchild, Methilda Sophia Vogt,* the sum of $50 monthly in the same manner and under like conditions as the specific legacy. 3d, the balance to be divided equally among my *children.*"

In paragraph 10 he says:

> "I give, *devise* and bequeath, when my youngest surviving *child* shall have obtained the age of 21 years, unto my wife Sophia lots 32 in square 456 and 12 in square 457 in the District of Columbia.
>
> "All the rest and residue of *my real estate* shall, when my youngest surviving *child* attains the age of 21 years, be sold, * * * The proceed be divided among *my heirs,* share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred. H. Vogt. Said share shall

> be paid to * * * as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to *his heirs* after his death."

In this will the testators has used the words *child* and *children* several times, and each time it cannot be said, I think, that there is any ambiguity in any sentence in which he has used either expression. Nor can it be contended with any force that the testator meant that the proceeds of his real estate were to be divided among his next of kin, or those who would take under the statute of distributions. In the same paragraph he devises certain definite real estate to *his wife,* who, under the statute of distributions, *would take one-third of the whole,* which it seems to us would negative any such intention. He could not have meant *children* because the most natural instinct at that point would have prompted him to have used that word. "Child" and "children" were the words to which he had restricted himself up to that point. His changing to "heirs" seems to our minds could have been for no other purpose than to show that he desired those who are known in law as "heirs" should take; that as to them it should be personalty, but as to him only those should take who in law would be his heirs.

When we find him using the word "heirs" as a designation of those who were to take Fred's share after Fred's death, it can hardly be said that he meant to use the word "heirs" in any other sense than that in which he had previously used it. That is, its primary legal sense. Those who would take real estate if Fred. should die intestate.

Suppose the court below is right and the word "heirs" was construed to mean those who would take under the statute of distribution; let us see what the ultimate effect might be; for instance, suppose the infant Mathilda should die before her father, the widow of the testator, Fred's mother, would then take Fred's entire share, and his brothers and sister, who were the testator's "heirs," would be entirely cut off. Could this have been the testator's intention? Hardly, so

why speculate on intention when we have an unambiguous sentence to deal with; every word having a well-defined technical meaning in law, and used in a devise, that has every earmark of having been prepared by a lawyer, and bears the signature as a witness of Mr. Myer Cohen, one of the best-known members of the bar of the Court of Appeals of the District of Columbia, and a well-known member of the bar of this court.

That it was the testator's intention that Fred. should have only a life estate in the fund may be perfectly true, but that would not in any manner alter the sense in which the word "heirs" was used.

It might be conceded that in 99 out of 100 cases where the "Rule in Shelley's Case" has been applied to a will, the testator's intention has been that the ancestors should take only a life estate. The inquiry has always been what was his intention as to the remainder? Did he use the word "heirs" as a word of limitation? If not, did he use it in some other sense, and if he did in what sense did he use it? That is the sole inquiry, and for that reason the fact that a testator intended to give the ancestor only a life estate can in no way throw light upon his intention or show what he meant when using the word "heirs" as a designation of those who were to take a remainder.

With due respect to the learned Chief Justice, I cannot help but feel that he did not thoroughly understand how to apply the rule. He seems to lay stress on the point that it was the testator's intention that Fred. H. Vogt should have only a life estate, and in construing the will this intention should have *great weight.* He says:

> "There can be no doubt that the real intention of the testator was that Fred. H. Vogt should *take nothing more than a life estate* in the designated share—that is, the income thereof during his life, and that the same should then pass into the possession and enjoyment of his children; and the question is whether the expression of this intention is so inconsistent

with the aforesaid rule as to be completely thwarted thereby" (Record, p. 27).

In the case of Jones *vs.* Morgan, 1st Bro., C. C., p. 205, Lord Thurlow said:

> "I take that rule to be that where the heir takes in the character of heir, he must take in the quality of heir. I take the question always to have been as to the import of the word 'heir' in the *proposed case.* All heirs taking as heirs, must take by descent.
> * * *
> *"I think the argument immaterial that he meant the first estate to be an estate for life. I take it that in all cases the testator does so mean. I rest it upon what he meant afterward."*

Now, in construing the will the court below admits, as we have before shown, that in using the word "heirs" the testator *meant those who would take in case of intestacy;* those of course who would take by descent, by operation of law. If such be correct, then how can we get away from the necessity of applying the rule? It must be applied unless the estate devised to the ancestor and that to the heirs are of a different quality; that is, one legal, the other equitable.

Whether, under the Tenth Paragraph of Will, the Ancestor, Fred. H. Vogt, and Heirs, take the Same Quality of Estates.

We respectfully submit that both upon principle and authority the interest of Fred. H. Vogt and the heirs in the fund are of the same quality, both equitable, Fred. H. Vogt taking an equitable life estate and the heirs an equitable remainder in fee. We further contend that the devise vests the entire legal estate in the trustees, to cease only after the carrying out of the purposes of the said trust, to wit, the payment of the principal to *"his heirs after his death."*

The authorities seem to be without a dissenting voice to the effect that there can rarely be an outstanding legal estate in remainder in personal property. Hill, in his work on Trustees, says (p. 288):

> "The question as to the duration of the estate of the trustees can rarely arise where the subject is personal property, for in that case the whole legal interest is generally vested in the trustee by a gift, without any words of limitation, and will continue in them until divested by a legal transfer or assignment."

Perry on Trusts, sec. 311, states:

> "Chattel interests in land and personal property were never within the statute of uses, and the legal title to them would remain in the trustee until the purposes of the trust are accomplished, and until possession of the property is in some way transferred to the person entitled to the use or the last use."

In other words, the legal estate only vests in the remaindermen at the termination of the trust. The quotation from Hill on Trustees is quoted and approved by the Court of Appeals of Maryland in the case of Denton *vs.* Denton, 17th Maryland, p. 43. The quotation from Perry on Trusts is stated by the Court of Appeals of Maryland in the cases of Warner *vs.* Sprigg, 62 Maryland, p. 14, and Long *vs.* Long, 62 Maryland, p. 68, as being decisive upon this point.

This exact question was before the Court of Appeals of Illinois in Glover *vs.* Condell, 163 Ill., 566, and for the purpose of seeing at a glance that the devise in the case at bar and the devise in that case are identical with each other we have placed the paragraphs in question side by side.

CASE AT BAR.

"The proceeds of said sale shall then be divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred. H. Vogt. Said share shall be paid to Charles Graff and Fred. Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred. H. Vogt, *the principal to be paid his heirs after his death.*"

GLOVER *vs.* CONDELL.

"is to be held by my executors as trustees, and in trust for him, and is to be loaned out on good security, or kept invested in stocks, and the interest or dividends is to be paid to him as the same accrues and is received during his natural life, *and after his death the principal of his share or part is to be paid to his heirs.*"

In the Illinois case Mr. Chief Justice Magruder, at p. 588, said:

> "But personal property is not within the status of uses. In the case at bar the trustee was to hold the proceeds of the sale—the money or securities representing two-thirds of Albert's share—during his life and invest the same and pay him the interest during his life, so that the trust was an active one and his estate was equitable. At his death the principal of his share is to be paid to his heirs, and so, for the purpose of turning his share over to the heirs by payment, or delivery, or assignment of securities, the legal title at his death still remained in the trustees, and *until such payment*, delivery or assignment, the estate of his heirs was equitable. In such cases the legal title remains in the trustee, 'until the purposes of the trust are accomplished, and until the possession of the property is in some way transferred to the person entitled to the use of the last use' (Perry on Trusts, third edition, sections 311-330; Kirkton *vs.* Cox, 94 Ill., p. 400). If, therefore, in this case the original devise to the trustees of the fund to be invested for Albert during his life and to be paid over to the children of the testator be construed by the application thereto of the principle involved in 'the

> Rule in Shelly's Case,' it cannot be said that the prior estate given for life to Albert and the *subsequent estate to go to his heirs* are not both of the same quality."

We respectfully submit the identical question before this court in this case also arose in the case of Warner *vs.* Sprigg, *supra*. There the testator directed that his whole estate, real, personal, and mixed, should be divided by three trustees into five equal parts; two of these parts to go to his daughter and the other three to be divided between his sons equally, share and share alike. **He then devised his whole estate to the trustees, to hold the same in trust for the three children according to their respective shares, permitting the children to receive the rents and income therefrom. The will then proceeds as follows:** "After the decease of my said sons, respectively, **their shares go to their several heirs-at-law."**

The court, at page 22, states:

> "It was decided as early as the twenty-second year of Elizabeth, that inasmuch as the statute (statute of uses) used the word 'seized,' and this word was only applicable to freeholds, copyholds and term of years were not embraced by it. And accordingly it has ever since been held that when estates of these descriptions, or personal chattels are limited to one person for the use of another, the first taker will have the legal estate in trust for the other. Consequently, by the will in question, the bequest carried the legal estate in the leasehold and personalty to the trustees, and the children took the equitable interest. By analogy to 'the Rule in Shelly's Case' the clause giving their shares, after their decease, to their 'several heirs-at-law,' gave them the absolute equitable interests."

And to the same effect are the following authorities:

Garth *vs.* Baldwin, 2d Vesey, p. 648.

Engle *vs.* Mades, 25th Washington Law Reporter, p. 229.

Webb *vs.* Webb, 1 P. Williams, p. 132.

Robinson *vs.* Fitzherbert, 2 Bro. Ch. Rep., 127.

And we respectfully submit that there are no authorities to the contrary.

The court below, however, did not even comment on these authorities or any one of them, but proceeded with a most startling and novel theory, that the "Rule in Shelly's Case" has no application, because the following language creates a vested remainder:

> "Said share shall be paid to Charles Graff and Fred. Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred. H. Vogt, the principal to be paid his heirs after his death."

And cites Poor *vs.* Considine, 6 Wall., p. 458, as authority. There are all sorts of ways of torturing the law to fit the facts of a given case, but with due respect to the court below, I make bold to submit such a bald and palpable misapplication of a decision would be next to impossible to find.

Poor *vs.* Considine (*supra*) deals with a devise to "*children*" not "*heirs.*" That the words "children" and "heirs" in their primary legal meaning in a deed or devise are not synonymous terms, but are antipodes each of the other, is elementary law. In view of this, how could the court below find anything in Poor *vs.* Considine (*supra*) which would lead him to believe or imagine that this court had determined or even intimated that a devise to the heirs of a living man would vest because they were *certain and definite?* Did he think that this court intended to overrule one of the fundamental maxims of the law, viz: "*nemo est haeres viventis*"? If so, why not put his ruling on that ground, so we all could understand, and not leave the question of his intention open and cause counsel to speculate, which Lord Davey says, in Van Grutten *vs.* Foxwell, is bad practice.

So little is that paragraph of the devise here in question like a vested remainder it is almost an exact example or illustration given by Ferne of a case falling directly within the "Rule in Shelly's Case." Ferne on Remainders, p. 29.

"The trust being expressly limited to the estate of Fred. H. Vogt, the remainder to the h is a legal estate, and hence there can be no u of the two estates under the 'Rule in Shel Case.'" (Rec., p. 29.)

That there is absolutely nothing on the face of the that warrants any such statement is perfectly apparen any one who should read it; and in the face of the a cited and quoted authorities it is beyond understanding the learned court below could so contend.

It would seem that the Chief Justice of the court b was somewhat tangled in his application of the rule law as laid down by Mr. Chief Justice Alvey in the cas Long *vs.* Long, 62 Md., 33, as he quotes the following th from, viz:

> "And in regards personalty, the principle is, when a trust has been created and all purpose the trust have ceased or at an end, the absolut tate is in the person entitled to the last use, u there is apparent intention to the contrary."

That there is such a rule of law we frankly concede; what application has it to the question here? None w ever. We are not here dealing with a trust estate afte termination and applying the rules of law applicable to cases as those cited by the court below, viz: Denton Denton, 17 Md., 407, a replevin suit over title to sl or Owen *vs.* Crow, 62 Md., 491, involving a dry trus any of the other cases cited which are of a similar c acter; but we are here concerned with the applicatio the other rule which we have heretofore quoted at le and which also was laid down in Denton *vs.* Denton (*sup* from Hill on Trustee, page 288, and as quoted in Long Long (*supra*), and Warner *vs.* Sprigg (*supra*), from P on Trusts, section 311, viz:

> "The legal title remains in the trustees until the purposes of the trust are accomplished and until possession of the property is in some way transferred to the person entitled to the last use."

It is horn-book law that in construing wills the guiding star should be *what quality of estate do the devisees take under the devise at the time of the death of the testator?* It is from that date that all wills speak, unless there is some clause therein to the contrary. The clause in this will is:

> "Said share shall be paid to Graff and Geiseking, as trustees, by them invested, the income therefrom to be paid to said Fred. H. Vogt, and the principal to be paid to his heirs after his death."

Is there anything in this paragraph that could even suggest that the testator intended to convey to a child of Fred. H. Vogt a vested remainder in the principal of Vogt's share of the estate? Is there anything in this paragraph to suggest that the trustees were not to retain the share of Fred. H. Vogt, invested by them, until after Fred. H. Vogt's death? We submit not. Who are the *cestui que trustents* provided for? Are they not Fred. H. Vogt and *his heirs?* Is there any manner in which this language could be twisted so as to mean that during the lifetime of Fred. H. Vogt his heirs should be determined and the remainder devised to them vest? We submit with all confidence that one and all of these questions must be answered in the negative.

A number of cases cited by appellee on his brief at first blush would seem applicable, but one and all can be readily distinguished if we bear in mind that there is a wide distinction between the duration of trusts which relate to real estate and the duration of trusts dealing with personal property. For example, "A" devises to "C," in trust, to hold and manage and to pay the income and profits to "B" for life, and at "B's" death transfer and convey in fee to "X" would

create in "X" a legal fee-simple estate in remainder, subject only to "B's" equitable life estate, as the statute of uses would execute the use, and, further, it might be said, as equity considers that as done which ought to be done, it would not require a conveyance from the trustee "B" to "X" after the death of "B" to complete "X's" fee-simple title. While, on the other hand, a trust framed in the same identical language relating to personal property would only convey an equitable remainder in fee to "X," because it would become necessary for "B," the trustee, to retain the possession of and the legal title to the trust fund until the purposes of the trust had been completed—*i. e.*, to transfer and deliver to "X" after the death of "B" the principal or corpus. This is identically what the courts have decided in Warner *vs.* Sprigg, *supra,* and in Glover *vs.* Condell, *supra.* We respectfully submit it seems to be an intelligent, clear, and logical distinction.

The cases of Westcott *vs.* Edmonds, 68 Pa., p. 34; Renzeihauzen *vs.* Kaiser, 48 Pa., p. 351, and Bacon's Appeal, 57 Pa., p. 505, cited on appellee's brief, were all cases dealing with trusts relating to real property.

It will also be noted that a great number of the cases that will be cited by appellee are suits brought by the *heirs* after the death of the ancestor, claiming that the trust has ceased. Such are the cases of Denton *vs.* Denton, 17th Md.; Ownes *vs.* Crow, 62 Md.; Hooper *vs.* Felgner, 80 Md.; Long *vs.* Long, 62 Md., and Lee *vs.* O'Donnell, 95 Md. In these cases the courts were endeavoring to ascertain whether or not the particular trust estates created by the deed or will had been determined, and consequently were looking for the *present* effect of the instrument. In all of them, with the exception of one, there was a bill in equity brought against the trustees. The exception, Denton *vs.* Denton, was an action at law to recover possession of certain slaves, which was dismissed for want of jurisdiction.

The question of jurisdiction should have more or less

weight in determining whether or not the trust estate has ceased to exist. Suppose we should so test the duration of the trust estate here for the purpose of ascertaining the character of the estate passing to the remaindermen. If Fred. H. Vogt were dead would there be any question as to what court the remaindermen would be obliged to apply to secure the principal of the estate? The devise says:

> "The proceeds of said sale shall then be divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred. H. Vogt."

There is no further devise of this fund, but a mere direction that it shall be paid to trustees, naming them, and a direction to these trustees to invest and pay the income to Fred. H. Vogt and the principal to the heirs after his death. Is not this a trust with power to invest the fund in stocks and bonds and other securities in the names of the trustees? If this is correct, how then could the legal title pass to the *heirs* of Fred. H. Vogt until the trustees assign, transfer, and deliver the securities in which the fund is invested? The fund or share may be invested at the time of the death of the life tenant in promissory notes secured by deeds of trust on real estate or registered bonds or shares of stock or any other securities in which the trustees may think proper to invest. The authority given to the trustees to so invest the share devised to Fred. H. Vogt seems beyond question. If the fund is so invested at the time of the death of the life tenant, could the heirs secure possession of the securities by an action of law? We submit not. Would not their only remedy be in a court of equity if the trustees should fail to carry out the terms of the trust? On the other hand, if the legal title to this fund should be held to have vested in the *heir apparent*, as contended, the trustees would not have the authority to invest, sell, and reinvest and control. There

then could be no valid sale of securities belonging to the estate except by consent of the vested legal remaindermen.

A great deal of stress is laid by counsel for infant and by the court below upon the decision of the Pennsylvania court in Bacon's Appeal, *supra,* page 505, yet, upon examination, it will be found that it is subject to all the criticisms made of the cases heretofore considered. First, it is a case which relates solely to real property; second, it is a case which arose on the construction of a will subsequent to the death of the life tenant; third, it is one of the cases repudiated and overruled by Grimes *vs.* Shirk, *supra,* as it treats "the Rule in Shelly's Case" as one of construction.

Mannerback's Estate, 133 Penn., 342, cited by the court below (R., p. 25), can readily distinguish from the case at bar. There the devise was of one-fourth of his personal estate to his son Samuel, with the provision that his son Samuel should receive the interest only on said share during his life, and at his death his *children should take absolutely, and without restriction,* the *share* so limited to their parent during his natural life. There was a *direct devise* of the *corpus* of the estate to *Samuel's children in remainder.* Samuel having children at the time of the death of the testator, the remainder, of course, was vested in them, and only subject to be divested at their death prior to the death of Samuel.

There was no active duty imposed upon the trustee to perform after the death of Samuel (the Pennsylvania authorities, without a dissenting voice, treat the statute of uses as applicable to personal property as well as real), and there was no obligation to invest. The fund was already invested, and it was a devise of *this fund directly to the children,* while in the case at bar there is no *direct* devise by the testator to the children of Fred H. Vogt. The devise to the remaindermen, if it can be called a devise, is *controlled* by the obligation imposed upon the trustees and through the trustees.

The only other cases cited upon this point are Mercer *vs.* Hopkins, 88 Md., p. 292, and Mercer *vs.* Safe Deposit Co., 91 Md., p. 102, neither of which seem to throw any light upon the case at bar.

The case of Mercer *vs.* Hopkins involves the construction of the will of the late philanthropist Johns Hopkins. There the court was only construing certain portions of the will, and, so far as the will is discussed by the court in its decision, it would seem to relate solely to real estate. Mr. Justice Fowler, in his opinion, page 306, says: "The testator devised to the trustees valuable property in the city of Baltimore, in the following terms," and there is nothing thereafter in the opinion which would even suggest that personal property was in any way involved, the court treating the whole thing as involving real estate. We find, at the bottom of page 309, the court quoting the cases of Ware *vs.* Richardson, 3 Maryland, p. 505, and Handy *vs.* McKim, 64 Maryland, p. 569, both of which relate solely to real property.

If adjudicated cases of long standing are to have any weight, then I submit it has been clearly established beyond doubt in this case that the Court of Appeals of the District of Columbia has erred in reversing the decree of Mr. Justice Gould. There is not a ground upon which the court below decided the case that is fortified by a single authority to support it, and the opinion even goes so far as to violate well established fundamental principles of the law, and revolutionize the settled canons of construction.

To disregard the settled rules of interpretation, sanctioned by a succession of ages and by the decisions of the most enlightened judges, under pretext that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction boundless in its range and pernicious in its consequence.

In conclusion, we respectfully submit that the decree of the Court of Appeals of the District of Columbia should be

reversed and the cause remanded to that court with instructions to affirm the decree of the Supreme Court of the District of Columbia of January 5, 1906.

Respectfully submitted,

JOHN C. GITTINGS,
Attorney for Appellant.

JUSTIN MORRILL CHAMBERLIN,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1911.

No. 73.

FREDERICK H. VOGT, *Appellant*,

vs.

MATILDA S. VOGT, by her Guardian *ad litem*, PAULINE VOGT.

BRIEF ON BEHALF OF APPELLEE.

The bill in this cause is filed by Sophia Vogt, the widow, and Frederick H. Vogt, Oscar G. Vogt, Clifford H. Vogt, Martha Vogt Brand, and Leo J. Vogt, the only children and heirs-at-law of John Vogt, against Graff, Gieseking, executors and trustees under the will of John L. Vogt, deceased, and Matilda S. Vogt, the appellee, for the purpose of obtaining, among other things, a construction of the last will and testament of said John L. Vogt, the husband and father of the complainants, and grandfather of Mathilda.

So far as it is material for the purposes of this appeal, the bill states that the said John L. Vogt, a resident of the District of Columbia, died August 8, 1894, leaving him surviving his widow and appellant, and the other complainants

his children and heirs-at-law, that appellant "is now unmarried;" that Mathilda S. Vogt (appellee) is the only child and sole heir apparent of appellant; that the deceased was possessed of considerable personal property and large and valuable holdings of real estate situate in the said District, the total assessed value of which was $127,084; that in and by paragraph 10 of his last will and testament deceased provided as follows:

> "I give, devise and bequeath, when my youngest surviving child shall have attained the age of 21 years, unto my wife Sophia, lots 32 in square 456 and 12 in square 457, in the District of Columbia. All the rest and residue of my real estate, shall, when my youngest surviving child attains the age of 21 years, or one year thereafter in the discretion of my executors, be sold by my executors at public auction after due notice in the newspapers of this city. The proceeds of said sales shall then be divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred. H. Vogt. Said share shall be paid to Charles Graff and Frederick Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred. H. Vogt, the principal to be paid to his heirs after his death."

Formal answer of the appellee by her guardian *ad litem*, having been filed, the Supreme Court of the District of Columbia decreed that under the provisions of paragraph ten of such will the complainant, Fred H. Vogt, took a one-fifth interest in the fund created thereby.

On appeal to the Court of Appeals this decree was reversed.

From the decree of the Court of Appeals appellant prosecuted his appeal to this Court, which was dismissed because the decree appealed from was not final. The cause was subsequently remanded to the Supreme Court of the District of

Columbia, where a final decree was rendered in conformity with the opinion of the Court of Appeals. On appeal from this latter decree to the Court of Appeals it was affirmed. The case is now here on appeal from that decree.

From an inspection of the will of John L. Vogt, as also from averments in the bill, it must be apparent that circumstances existed which in the judgment of the testator required him to make provisions for his grandchild, the daughter of his son, Frederick H. Vogt, the appellant, as also for the mother of such child, and from the expressions in paragraphs five and nine, it must be apparent that Frederick H. Vogt and his wife, Pauline, had been judicially separated at some time prior to the execution of the will of his father. The grandchild seems to have been in the mind of the testator, and participation by it in the income derived from the estate up to the period of a distribution or partition of the estate (the attainment of 21 years by the youngest surviving child) is provided for in paragraph nine.

It must also be apparent to the court that it was without doubt the intention of the testator to give his son, Frederick H. Vogt, only an income for life from the share which was directed to be paid the trustees, Graff and Gieseking, and that the testator did not intend that such son should ever come into possession of the principal fund. This intention is plainly and explicitly expressed, and, for the purpose of effectuating such intention, the most liberal and enlarged interpretation will be given to the language of the will, if consistent with the settled rules of law (Chew vs. Chew, 1 Md., 163, 168).

The question involved is, whether the rule in Shelley's Case is applicable to the bequest, and whether the language of the will can be construed as vesting in Frederick H. Vogt an absolute estate in the principal of the fund.

The case of the appellant depends wholly upon his ability to establish his contention that the clause of the will providing that his share "shall be paid to Charles Graff and Fred Gieseking, as Trustees, by them invested, the income therefrom to be paid to Frederick H. Vogt, the principal to be paid to his heirs after his death," is controlled, contrary to the plain intent of the testator, by the rule in Shelley's Case. To sustain this contention, each of the following propositions must be maintained by him:

I. That his own life interest under the clause in question being plainly an equitable one, the remainder to his "heirs" is also equitable.

II. That the word "heirs" is used as a word of limitation.

III. That the rule in Shelley's Case is applicable to personal estates.

IV. That the rule, if it is to be applied at all to personal property, is to be so applied as a rule of law, however contradictory to the plain intent of the will, and not as a rule of construction, to be disregarded where the contrary intent is manifest.

We submit that Vogt takes but a life estate in the income to be derived from the fund, and that the case is not within the rule, because:

First.—The interest bequeathed to Vogt is of a different quality or nature than that bequeathed to "his heirs."

I.

The testator having directed a sale of his real estate and a distribution of the proceeds, a conversion into personalty is worked, and the property in controversy must be considered and treated as personalty.

Cropley vs. Cooper, 19 Wall., 174.

The rule in Shelley's case is succinctly and briefly stated in Green v. Green, 23 Wall, 486, 488, as follows:

> " 'that when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, the heirs are words of limitation of the estate and not words of purchase.' "

The limitation to the ancestor and his heirs must both be of the same nature or quality, either both legal or both equitable, and not one legal and the other equitable.

1 Preston on Estates, 321.
Green vs. Green, 23 Wall., 486, 489.
Simms vs. Georgetown College, 1 App. D. C., 72, 79, 80.
Handy vs. McKim, 64 Md. 560, 573.

The estate to Vogt at the most is an equitable life estate; that to his heirs is an absolute legal estate. In that event they do not coalesce.

In the opinion of the learned Justice of the Supreme Court of the District of Columbia (Rec., p. 19), the view seems to have been entertained that the quality of the estates taken by the appellant and by his heirs, is to be ascertained as of the date of the testator's death, and that the estate which the latter were to take at the termination of the life tenancy is not to be looked to. We submit, however, that the trusts of the clause were for the benefit of the appellant only; and that the estate given his heir or heirs, vested at the time of the testator's decease, though to be enjoyed *in futuro*, and was a purely legal one, appellant's contention is, that the condition or character of the estate in remainder, during the existence of the particular estate, fixes its quality, and that during the life tenancy of Frederick H. Vogt, the estate in remainder is equitable. The test is, what is the quality of the estate limited to the remaindermen *upon the expiration of the particular estate?*

This is the view adopted by this court in Croxall vs. Shererd, 5 Wall., 268, 282, where it is said:

> "If Mary Croxall took under the deed an equitable contingent remainder for life and Thomas *at her death* would have taken a legal estate tail if the estate still subsisted, the statute in his case, executing the use, then the estates could not coalesce, one being legal and the other equitable and the rule in Shelley's case would not apply."

The interest bequeathed to the "heirs" is a vested remainder.

In the Croxall case, the court, in drawing the distinction between a contingent and vested remainder, says, at page 287:

> "The struggle with the courts has always been for that construction which gives to the remainder a vested rather than a contingent interest. A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested. If an estate be granted for life to one person, and any number of remainders for life, to others in succession and finally a remainder in fee simple or fee tail, each of the grantees of a remainder for life takes at once a vested estate, although *there be no probability and scarcely a possibility that it will ever, as to most of them, vest in possession.*"

The court cites Chancellor Kent's definition of a vested remainder and continues:

> "It is the present capacity to take effect in possession, if the precedent estate should determine, which distinguishes a vested from a contingent remainder."

Does it not follow that the vested remainder is the estate which the person, to whom it is given, will take when the precedent estate ceases? Or, in the case at bar, have the remaindermen any interest whatever in the precedent equitable estate? Is not such a construction especially erroneous when its effect would be to destroy the vested remainder?

The opinion of this count in Doe, Lessee of Poor, vs. Considine, 6 Wall., 458, 474, contains an epitome of the law on vested remainders. It is there said:

That the remainder must pass out of the grantor at the creation of the particular estate, and must vest in the grantee during the continuance of the estate or *co instanti* that it determines; that the remainder will not be construed as contingent when it can be taken to be vested; that estates will be held to vest at the earliest possible period unless there be a clear manifestation of the testator to the contrary; and that "adverbs of time as *where, there, after,*

from, etc., in a devise of a remainder are construed to relate merely to the *time of the enjoyment of the estate and not the time of the vesting in interest.*

The court adopts the rule laid down in Blanchard vs. Blanchard, 1 Allen, 227:

> "Where a remainder is limited to take effect *in possession,* if ever, immediately upon the determination of a particular estate, which estate is to determine by an event *that must unavoidably happen by the efflux of time,* the remainder *vests in interest* as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate, will prevent such remainder from vesting in possession."

And in 4th Kent's Commentaries—

> "the present capacity of taking effect in possession—if the possession were to become vacant—distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues."

To the same effect is Richardson vs. Penicks, 1 App. D. C., 261, 264, where it is held that under a devise to a person for life, "and after her death to my son, upon his attaining his majority," the son took a vested remainder, *postponed in enjoyment* until his majority, and subject to defeasance by his death.

The courts lean towards vested rather than contingent interests because testators generally have in mind the immediate benefit of a legatee, though they may wish to postpone the actual enjoyment of it to a future period.

Shattuck vs. Stedman, 2 Pick., 468.
Gibbens vs. Gibbens, 140 Mass., 102, 105.

> "A bequest in the form of a direction to pay at a future period *vests in interest immediately*, if the payment be postponed for the convenience of the estate or to let in some other interests."
>
> "So a devise of lands to be sold after the termination of a life estate given by the will, the proceeds to be distributed thereafter to certain persons is a bequest to those persons and *vests at the death of the testator.*"
>
> Cropley vs. Cooper, 19 Wall., 167, 174-5.

So, in Thaw vs. Richie, 136 U. S., 519, 546, where the estate was held to be a vested remainder, this court said:

> "The legal estate in remainder in the children, which nothing but their own death before the determination of the widow's life estate could prevent from vesting in possession vested *in them from the death of the testator*, subject to be divested by their dying before the widow."

The result of the decisions is that the direction that property be paid to remaindermen at the expiration of the particular estates relates to the *period of enjoyment*, and not to the *vesting of the interest.*

Tested by these rules, we submit that the "heirs" of Frederick H. Vogt take a vested remainder, *vesting in interest at the death of the testator*, and *in possession and enjoyment* at the *death of the equitable life tenant.* Such interest is a legal vested interest, not converted into an equitable interest because of the existence of the trust during the life of Vogt.

Moreover, the trust ceases at the moment of the life tenant's death. It operates only during the existence of the

life estate, and therefore can not convert the estate of the remainderman into an equitable interest.

It is true that the "principal is to be paid" to his heirs, but, inasmuch as equity considers that as done which ought to be done, the title and possession of the fund will be presumed to have passed.

Under the authorities, when a trust in personalty has been created and the purposes of the trust have ceased or are at an end, the absolute estate is in the person entitled to the last use.

Where the direction of the active trust is that the trustees are to convey after the termination of the trust, they do not continue as trustees for such person, but the trust terminates and the legal estate vests without conveyance.

In fixing upon the duration of a trust the court ascertains the intention of the creator of the trust, and the purposes of its creation, and limits its existence by these. A trust will not be held to continue longer than its purposes require.

In Long vs. Long, 62 Md., 33, the trust created by the will of the testator affected *both real and personal estate*, and one of the principal questions in controversy was whether the remaindermen took legal or equitable estates. The court considered the trusts with respect to both the real and personal property. We quote from the opinion at page 64:

> "Looking to the context and the whole scheme of the will, it would seem to be quite manifest that the testator intended that his son Andrew K. Long, and his three daughters, should take equitable life estates only, and that the trustees should hold the legal estate during the respective lives of these children of the testator. The use therefore was executed in the trustee and his heirs, during the respective lives of these tenants, and not in the life tenants themselves. But

with respect to the devises in remainder to the grandchildren, it is declared that from and immediately after the death of the parent, the equitable life tenant, the principal of his or her share shall descend to *and be equally divided* between all and every the child or children of such life tenant, their heirs, executors, administrators and assigns, in equal proportions, as tenants in common, share and share alike. This language gives an absolute, uncontrolled estate, and it does not import that the children were to take through their parents by descent, but they take as purchasers by way of devise. And such being the case, it would seem to be clear that the devisees in remainder take legal estates, and not equitable estates as did the devisees for life. *There is no active duty or exercise of discretion whatever required of the trustees in respect to these devises in remainder. The direction that the shares so given in remainder shall be equally divided means nothing more than that each child of the several tenants for life shall have an equal interest in the share devised to his or her class in remainder. It required no active agency of the trustees to ascertain such interests;* the language and form of the devise being *that most usually employed* in devises and bequests to several parties, intended to be equally benefited, and where no trustees are interposed. Each set or class of devisees in remainder take as tenants in common, share and share alike. Therefore, though the devise to the trustees was to them and their heirs, and thus in terms giving them an estate of inheritance in the realty yet the trust created was not required *for any practical or useful purpose beyond the lives of the equitable life tenants; and it is not to be supposed that the testator intended that the trust should continue through all generations.* The principle is now firmly settled upon the most indubitable authority, that the extent of the legal interest of a trustee in an estate given to him in trust is measured not by words of inheritance or equivalent terms, but by the objects and extent of the trust upon which the estate is given. Or, as the proposition is in other

words stated, 'although a legal estate may be limited to a trustee to the fullest extent as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust necessarily requires.' *And in regard to the personalty, the principle is, that when a trust has been created, and all the purposes of the trust have ceased, or are at an end, the absolute estate is in the person entitled to the last use, unless there is an apparent intention to the contrary.*"

So, in Owens vs. Crow, reported in 62 Md., 491, where leasehold and personal property had been conveyed in trust for the sole use and benefit of another, the court said, at page 494:

"It does not appear that any of the property conveyed was real estate, it consisted of a leasehold interest in a house and lot in the city of Baltimore, and some household furniture and three slaves, two women and a boy. Although Sarah Owens was named as trustee in the deed, no duties were imposed upon her, and no functions were to be performed by her. She held the dry legal estate, and the only effect of naming her in the deed was to enable her to hold it. The beneficiary, Ida Crow, was the real owner of the property, and the absolute legal estate would have been vested in her by operation of law, whenever, for any purpose, it was necessary that she should have it. The trustee could not hold the legal title as against her, or as against her guardian. As the trustee had no duties to perform, there was no purpose for which the trust could be continued in existence. The object of appointing the trustee was to enable her to receive the legal title to the property from the grantors, and as soon as this object was accomplished, there was no longer any reason for continuing the trust. 'When a trust has been created in personalty, and all the purposes of the trust have ceased, or at an end, the absolute estate is in the person entitled to the last use.' Denton vs. Denton, 17 Md., 407."

In Hooper vs. Felgner, 80 Md., 262, the court, after discussing the effect of the Statute of Uses upon personalty, says, at page 272:

> "At the same time, however, it may be considered settled, that a trust in regard to personal property will continue so long and no longer than the purposes of the trust require, and when all the objects of the trust have been accomplished the person entitled to the beneficial use is regarded as the absolute owner, and as such, entitled to the possession of the property. Under this will the object and purposes of the trust, namely, that the trustees should pay the net income to G. F. during her life, were fully accomplished and *upon her death the trustees had no longer any active duty to discharge. And that being so, her two children being entitled to the ultimate use became the absolute owners of the property.*"

So in Lee vs. O'Donnell, 95 Md., 538, 545, in which the trust covered both real and personal property, the court says:

> "The solution of this question (termination of the trust) depends *upon the intention of the testator* to be gathered from the will thereof, and upon the application of certain well settled principles of law involved in the construction of wills. The rule of law is well settled that *where no intention to the contrary appears,* the language used in creating the trust estate will be limited and restrained to the purposes of its creation and when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation."

In Mercer vs. Hopkins, 88 Md., 292, the testator gave certain real and personal property in trust for life, and a certain period thereafter, at which period a certain portion

"shall vest absolutely in the children of E" (the life tenant). It was contended that under this and other provisions of the will, the life tenant took an absolute estate. Says the court, however, at page 309:

> "It is well settled that in order to coalesce and form one absolute estate under this rule, the two estates must be of the same quality, both must be equitable or both legal. In order to make this rule apply to the devise under consideration, it would be necessary to cast aside the express language used by the testator, by which he declared that the legal estate should be held by the trustees in trust for the life tenant, and from the expiration of the equitable life tenancy in trust for the period of 20 years, when the estate was to vest absolutely in the children or descendants of such life tenant, if any, and in default of any such issue, living at that time, then to the persons who should answer to the *description of heirs-at-law of such life tenant.* Here we have an equitable life estate, and a subsequent fee simple or absolute estate. Under such circumstances, it is settled, the rule in Shelley's case cannot be invoked."

In Mercer vs. Safe Deposit Co., 91 Md., 102, the conveyance in trust was both of real and personal estate and provided that "If said S. H. M. (grantor) should die, leaving at the time of his death, neither a widow or children or descendants living at such time, then in trust for the right heirs of said grantor by the laws of the State of Maryland." The court, at page 117, says:

> "As the preceding life estate in the grantor was an equitable estate, and the remainder to the heirs a legal estate, this limitation is not within the rule in Shelley's case."

We have quoted at length the late Maryland cases, as also the cases hereafter cited, for the purpose of showing that

the courts determine the life of a trust by a consideration of the intent of the creator of the trust, and the purposes and object for which the trust is created; that the same rule which is applied to realty, is applied to ascertaining the termination of a trust relating to personalty.

We also submit that in the light of the Maryland cases, the reasoning by which the estate of the remaindermen in the personal property in Warner vs. Sprigg, 62 Md., 14 (relied upon by appellant), was held to be an equitable estate, has been modified and, in fact, practically abandoned, and in the light of these later decisions the estate of the remaindermen, inasmuch as the trust ceased upon the expiration of the life estate, would now be held to be a legal instead of an equitable estate. The effect of these decisions is to limit the powers and title of the trustee to such life tenancy, and terminate the trust upon the death of the life tenant. A comparison of the later cases with the Warner case can result in no other conclusion, and it must be apparent that the Warner case has not been followed by them.

In Renziehausen vs. Keyser, 48 Pa. St., 351, the trust required the trustee "to deliver over, transfer and re-convey" the estate, which consisted of personalty, upon the survival of the grantor after certain conditions, the court held "that the trust had ceased and no conveyance or transfer was necessary to vest the title."

In Bacon's Appeal, 57 Pa. St., 505, the testator by a codicil which is set out at pages 506-7 of the report, bequeathed *his personal estate in trust* to invest the same and to pay the income to his daughters during their lives, and upon their death, respectively, to their respective husbands for life, and "from and after the decease of my said daughters and their husbands respectively the shares of each daughter *shall go to her right heirs forever.*"

In an exhaustive opinion the court, among other things, at page 513, says:

> "In the case before us the purpose of the trust was accomplished when Mrs. Bacon died. *The testator did not intend that the trustee should hold any estate after her death.* He contemplated its immediate transmission to the remaindermen, a transmission by conveyance indeed, *but not held in trust for those in remainder. There was therefore nothing substantial to be secured by treating the legal estate as remaining in the trustees and only an equitable interest in Mrs. Bacon's heirs.*"

Continuing, the court applies the same reasoning to the trusts in respect to the personalty, and as a consequence holds that the rule in Shelley's case does not apply, inasmuch as the two estates were not of the same quality.

To the same effect is Wescott vs. Edmonds, 68 Pa. St., 34.

In Mannerback's Estate, 133 Pa. St., 342, in which there was a devise of personal property to the trustee in trust to pay the income derived from the fund to each of his children for life, "and upon the death of each of my said children, then the children of such deceased child shall take absolutely," it was held that the rule in Shelley's case was inapplicable, because the trust being active the life estate given to the children was an equitable one merely, and the remainder limited to their children was a legal estate.

To the same effect is Harbster's Estate, 133 Pa. St., 351.

It is contended by appellant that Bacon's Appeal and Mannerback's Estate have been overruled by the decision in Grimes vs. Shirk, 169 Pa. St., 174, a case in which the application of the rule to a devise of real estate was only discussed. On the contrary we find that the doctrine laid

down in the two criticised cases instead of being overruled was followed by the Pennsylvania court in Eshbach's Estate, a case decided some years after Grimes vs. Shirk, and which is identical with the case at bar.

In Eshbach's Estate, 197 Pa. St., 153, the testator directed that the residue of his estate should be converted into money and the fund be divided in seven equal parts. He then devised as follows:

> "One full seventh share or part thereof I give and bequeath to my hereinafter named executors and the survivor of them, in trust, that they or he do and shall put and place the same out at interest and pay over the interest thereon from time to time, when and as the same shall be got in and received, unto my daughter, Susannah Good, wife of Josiah Good, during the term of her natural life; and after her death the *said principal shall go to her heirs and assigns forever.*"

Says the Court at page 159:

> "The language used by the testator in his will is plain and we think his intention is clearly apparent. He gave to each of his five children and the children of a deceased child the one-seventh share of the residue of his estate absolutely. He then in language distinct and unequivocal bequeaths the other one-seventh part thereof to his executors in trust, that they shall invest it and pay the interest arising thereon to his daughter Susannah Good, during her natural life. It is, therefore, manifest that he intended to make a distinction between Mrs. Good and his other children so far the distribution of his estate was concerned. He gave the corpus of the fund to his other children, but he did not intend that Mrs. Good should have any part of the principle, but only the interest thereon, during her life. This is clearly and distinctly stated by the testa-

> tor and his intention cannot, therefore, be misunderstood. We must presume he had a good reason for limiting his daughter's interest in the estate to the interest on the fund instead of bequeathing to her the principal. In Stambaugh's Estate, 135 Pa., 596, Chief Justice Paxson delivering the opinion of the court, says: 'The latter (testator) had certainly some object in creating this trust for Moses. What was it? We do not think the answer difficult. The mere fact of the giving only of the income, and the interposition of a trustee, implies distrust as to his son.' This remark is an applicable to the bequest under consideration. The testator not only doubted the ability of Mrs. Good to manage the corpus of the fund so as to give her the benefit of it during her life, but also desired the fund itself, after her use of it for life, to go to and be enjoyed by others. He, therefore, placed it in the hands of trustees for this purpose. * * * There is another reason why this is an active and continuing trust during the life of Mrs. Good. The estate in remainder was a legal estate. It was vested in the heirs of Mrs. Good. Her estate, however, was purely equitable. The rule in Shelley's case was not applicable and the two estates could not coalesce and thus give the fund to Mrs. Good absolutely."

McCann vs. Barclay, 204 Pa. St., 214, and Shapley vs. Diehl, 203 Pa. St., 516, cited by appellant, were also cases of devises of real estate.

In Hanna vs. Hawes, 45 Iowa, 437, 438, the bequest was "To my daughter Sarah Little, wife of Sylvester Little, I give the sum of $2,000 to be invested in lands; for my daughter to have the income of the same during her life, and at her death, to *go to the heirs of her body*, and if none, to be divided equally between the surviving children of her mother, Sarah Stoddard; and in case of my death before the execution of the above, I direct my executors to carry

out my directions." The court held that the rule in Shelley's case did not apply.

So, in Ward vs. Armory, 1 Curtis, 419, a case involving the application of the rule in Shelley's case, the court, among other things, at page 423, says:

> "If it appears from the context that only the proceeds of the fund was intended for the legatee, the principal does not pass; and one mode in which this may appear is the insertion of words *limiting the duration of the trust* through which alone the legatee is to take."

The rule as to termination of a trust is stated in Poor vs. Considine, 6 Wall., 458, 471.

> "When a trust has been created, it is to be held large enough to enable the trustee to accomplish the object of its creation. If a fee-simple estate be necessary it will be held to exist though no words of limitation be found in the instrument, by which the title was passed to the trustees and the estate created. On the other hand it is equally well settled *that where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation. And when they are satisfied the estate of the trustee ceases to exist and his title becomes extinct and the extent and duration of the estate are measured by the objects of its creation.* Jarman says 'Trustees take exactly the estate which the purposes of the trust require; and the question is not whether the testator has used words of limitation or expressions adequate to carry an estate of inheritance but whether the exigencies of the trust demand the fee-simple or can be satisfied by any and what less estate."
>
> "The general rule is that a trust estate is not to continue beyond the period required by the trust and notwithstanding the devise to the trustees and their heirs,

they take only a chattel interest where the trust does not require an estate of higher quality."

"This doctrine rests upon a solid foundation of reason and authority, irrespective of the presence or absence of the statute of uses. The consequences in this case of the absence of such a statute in Ohio, it is therefore not necessary to consider."

II.

THE WORD "HEIRS" AS USED IN THE WILL SHOULD BE CONSTRUED AS *DESIGNATIO PERSONARUM,* DESCRIPTIVE OF THE PERSONS WHO WERE TO TAKE UPON THE DEATH OF THE LIFE TENANT.

Before, however, the rule in Shelley's case can be applied to a conveyance or devise, it is necessary to ascertain what the grantor or testator has meant by the use of the word "heirs," and this meaning should be ascertained without any reference whatsoever to the rule, because, until the meaning is ascertained, it is uncertain whether the rule shall be considered or not.

Hargrave Law Treatise, 574, 476.

Whether the word is used in a technical sense, or in a limited, or restrictive and untechnical sense, intended to point at such person or persons as should be heir of the tenant for life, at the moment of his decease, is a matter of construction.

Hargrave Law Tr., 575-6.

And whilst, by analogy, the rule in Shelley's case is applied to gifts of personalty, in all cases where the word is used in a bequest of personalty, it is held to yield to the intention of the testator. The rule is applied by way of analogy, for the purpose of construction and not as a rule *stricti juris*, and it therefore yields more readily to an apparent intention than when it is applied to a devise or grant of realty.

Bennett vs. Bennett, 217 Ill., 434, 444.
Taylor vs. Lindsay, 14 R. I., 518, 520.
Gross vs. Sheeler, 31 Atl. Rep., 812.

So this court in De La Vergne Machine Co. vs. Featherstone, 147 U. S., 209, 222, referring to the rule in Shelley's case, says:

> "This is a rule of law and not a rule of construction. It applies to nothing but real estate, and if resorted to in connection with personal estate, it is only by way of analogy, and is a rule of construction in order to promote the intention."

The signification of the word is in all cases a question of intention.

Howell vs. Ackerson, 89 Ky., 22, 28.
Haley vs. Boston, 108 Mass., 576, 579.
Jones vs. Lloyd, 33 Ohio St., 572, 578.
Albert vs. Albert, 68 Md., 352, 368.

In delivering his opinion in the case of De Beauvoir vs. De Beauvoir, 3 H. L. Cases, 524, the Lord Chancellor, at page 557, says:

> "So far, therefore, as the authorities go with respect to personal estate, whether the gift be an immediate gift, or whether it be a gift in remainder, the cases appear to be uniform—to give to the words the sense which the testator has impressed upon them—that if he has given to the heir, although the heir would not, by law, be the person to take that property, he is the person who takes as *persona designata*. It is impossible to lay down any other rule of construction." * * * "But there is nothing to prevent your giving to your heir even by that description if it sufficiently designates him as the party who is to take it, any sum of money you think fit, or the whole of your personal estate." * * *

The question is fully discussed in Martling vs. Martling, 55 N. J. Equity, 771, where the devise was, among others, upon the death of the life tenant to have the lands held, or if the same should have been sold, to dispose of the proceeds unto such persons as the life tenant by writing in the nature of a last will may have directed, "and in default of such appointment unto her heirs at law or next of kin as may be." Says the Court, at page 791:

> "On the construction of the entire trust contained in this deed we think that the persons who are to take in succession as heirs at law are to be ascertained as of the time of Mrs. Martling's death, and that, therefore, those words are not words of limitation within the rule in Shelley's Case, but a *designata personarum* of those who shall be her heirs at the moment of her decease, and that consequently Mrs. Martling took only an estate for life."

In Monast vs. Letourneau, 87 Ill. App., 300, the agreement under construction provided that the interest from the principal fund should be paid to A for life, after his

death, to his wife for life, and at the death of the survivor, the principal should be paid to the heirs of A. It was sought to apply the rule in Shelley's Case. Says the court at page 303:

> "This promise, as to the principal fund, is to pay the heirs only, and not to pay Vassauer at all. In no contingency was the principal fund to be payable to Vassauer. The words "heirs of the said Noel Vassauer" must be held to designate and apply to those who should answer that description at the death of Vassauer." * * * "If the rule in Shelley's case be applied to the interpretation of said articles, yet that rule is subject to the qualification that, although often applied to grants of personality, by way of analogy for purposes of construction, yet when so applied it yields more readily to an apparent intention of the grantor than it does in grants of realty."

To the same effect is Bennett vs. Bennett, 217 Ill., 434.

In Jones vs. Rees, 6 Pennewill, 504, decided by the Supreme Court of Delaware, in January, 1908, where the bequest was of personalty in trust for a daughter for life, "and from and after her decease it is my will and I direct that all the said property, moneys * * * shall be held by the said Thomas A. Rees free and discharged from the aforesaid trust to and for the use of the heirs and assigns of the said Ann Jane forever;" it was held that the rule in Shelley's case does not apply, and that the word "heirs" should be considered as *descripto personarum* or as *persona designata*.

It is apparent that, if the word "heirs" in the clause of the will under consideration is taken in its accurate legal meaning, it cannot be treated as a word of limitation with respect to personal estate, which class of property passes, not to the heirs, but to the next of kin. A bequest of money

to A for life with remainder to his "heirs-at-law," in the proper, legal signification of that term, would be as far from presenting a case for the application of the rule in Shelley's Case as would a devise of land to A for life, with remainder to his next of kin, and there is, we submit, strong ground in principle and abundant foundation upon the authorities for the proposition that a bequest of personal property to A for life with remainder to his heirs constitutes in the absence of a contrary intention derived from the context, a *designatio personarum,* under which the bequest in remainder passes to those persons who, upon the death of the life tenant, would be entitled at law to succeed to his real estate.

In Low vs. Smith, 2 Jur. N. S., 344, a gift of personalty to be equally divided, after the death of A, among his "legal heirs," was held to be a gift, not to his next of kin, but to the persons who should be his heirs, in the primary sense of that term, at the time of his death. This decision is cited and approved in Smith vs. Butcher, L. R. 10, Ch. Div., 113.

In both these cases, as also in Sands vs. Old Colony Trust Co., 195 Mass., 579, where the familiar rule is applied that technical legal terms, used by a testator, are to be taken in their technical, legal sense, unless the context shows them to have been used in a different sense, it is held that the word "heirs" has a fixed definite legal meaning, and that, when applied to fix the beneficiaries of the bequest of personal property, it is to be taken in its proper legal sense, as designating the heirs of the life tenant as such beneficiaries.

So in Clarke vs. Cordis, 4 Allen, 480, the court said:

> "Like all other legal terms, the word 'heirs' when unexplained and uncontrolled by the contest, is to be

> construed according to its strict technical import, in which sense it designates the persons who would by the statute succeed to the real estate in case of intestacy."

The word "heirs" is found only in the residuary clause of the will, occurring there twice, following the direction for sale of all the real estate within one year after the majority of the testator's youngest child. The clause provides as follows:

> "The proceeds of said sales shall then be divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick Gieseking, as trustees, and by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death."

Is the word "heirs," as it first occurs in the above quoted provision of the will, used in its technical, legal sense, namely, as a word of limitation? Clearly not, for the following, among other, reasons:

1. It is a designation of those who are to take in the first instance, with no precedent donee, whose estate the word can have been used to define.
2. The gift is to be received by the donees in distinct, already divided shares, a separate one to each, and is not to descend *in solido* to them as heirs, *i. e.*, as co-parceners or tenants in common, as in every case of inheritance.
3. The gift is to them, not as heirs, whose proportionate shares will be determined as a matter of law by their relative relationship to the testator, *per stirpes* or otherwise as the law shall prescribe, according to the variable conditions

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which may prevail at the date either of the testator's death or at the time of distribution, but "share and share alike, and paid over to them respectively at once."

It being thus beyond dispute that, where it first occurs, the testator used the word "heirs" in a non-technical sense, not as word of limitation, but to designate the members of his family among whom the proceeds of his real estate should be divided, the authorities are overwhelming to the effect that the word is to be taken in the same sense, in the absence of any manifestation of a contrary intent, where it is again used in the same instrument.

Elliott vs. Carter, 12 Pick., 436, 443;
Bundy vs. Bundy, 38 N. Y., 421;
Kiah vs. Grenier, 56 N. Y., 220, 224-5;
Lawrence vs. Lawrence, 105 Pa. St., 335, 341.
Breasley vs. Breasley, 9 N. J. Eq., 27;
Chew vs. Chew, 1 Md., 168;
Van Nostrand vs. Moore, 52 N. Y., 12;
Van Kleck vs. Dutch Church, 20 Wend., 471;
Tucker vs. Tucker, 1 Seld., 418;
Tucker vs. Ball, 1 Barb., 94;
Koppock vs. Tucker, 59 N. Y., 208;
Carnegie vs. Woodstock, 2 Munf., 234;
Feltham vs. Butts, 8 Bush., 119;
Moore vs. Moore, 12 B. Mon., 656;

Even where the word occurs in different instruments, as in two statutes, enacted at different times but *in pari materia*, the like rule prevails.

United States vs. Cent. Pac. R. R. Co., 118 U. S., 235, 240.

But in this case the word "heirs" is not in different clauses, but appears in consecutive sentences, uttered in the same breath, and in respect to the same subject matter; can it be urged that the testator in the last sentence attached a meaning to the term different from that which he attached to it in the sentence immediately preceding it?

Not only is this the general rule, but it is one for many years recognized and followed in the jurisdiction from which this case comes.

Ferry vs. Langley, 1 Mackey, 140;
Butler vs. Butler, *2 Id.*, 96, 104;
White vs. Crenshaw, 5 *Id.*, 113, 118.

III.

The decision of the Supreme Court of the District of Columbia further proceeded upon the proposition (R., 18): "It must also be conceded that the rule in Shelley's Case is applicable, by analogy, to personal property, and to the same extent as to real property," for which a single case, that of Hughes vs. Nicklas, 70 Md., 484, is cited.

This proposition of the court of first instance, namely, that it must be conceded that the rule in Shelley's Case is applicable to personal property, and to the same extent as to real property, is at page 3 of the brief of the appellant in this Court treated as an actual concession, not only that the rule is so applicable, but contrary to all the authorities upon the subject, that it is so applicable as a positive rule of law, and notwithstanding the fact that the result may be directly contrary to the testator's intention.

That the rule in Shelley's Case is not, by its own terms, susceptible of application to personal property, is apparent from the rule itself: "Where, in the same instrument, the

ancestor takes an *estate of freehold* with remainder mediately or immediately to his heirs, the word heirs is a word of limitation of the estate, and not of purchase." There are no freehold estates, and no heirs, with respect to personal property.

"There is no authority for holding that, because the rule in Shelley's Case * * * applies to real estate, it is to be applied to personal estate, also." Herrick vs. Franklin, 6 Eq. Case, L. R. 592. And that the rule does not apply to personalty is sustained by many other authorities. Smith vs. Butcher, L. R. 10, Ch. Div. 113; Jones vs. Rees, 6 Pennewill's (Del.) Rep., 540; Gross vs. Shecker, 7 Houst., 280; Avern vs. Lloyd, 5 Eq. Case, L. R., 383; Crawford vs. Nearn, 115 N. C., 540; Clemens vs. Hecksher, 185 Pa. St., 476.

"On authority and reason, the rule in Shelley's Case should not be held to apply to gifts of personalty." Lord vs. Comstock, 240 Ill., 492, 505-7, citing and approving the foregoing authorities, together with Kales on Future Interests, Sec. 135.

IV.

But, in the fourth place, if it be conceded that the life estate given appellant and the remainder to his heirs are both equitable estates; that the word heirs in the will is to be taken to mean next of kin, and that the rule in Shelley's Case is applicable, to bequests of personalty as well as to gifts of real estate, the appellant must still fail to show error in the decree below unless the rule, as applicable to personalty, is to be treated as a rule of law, absolutely controlling the gift, as is contended in the brief for appellant, and however contrary to the manifest intention of the testator.

As above pointed out, the rule, by its terms, is in strictness confined to real estate. It is only by analogy, under any of the authorities, that it is held applicable to personal property. The present inquiry is, whether, in its adoption by analogy, it is to be given that absolute, controlling effect which belongs to a rule of law, and which makes it operative, however contrary to the manifest real intent; or whether, in its adoption by analogy to a class of property to which it does not in terms belong, it is treated merely as a rule of construction, employed as one among other means of ascertaining the intent, but never to override or defeat the intent, where it is plain that its application would accomplish that result.

It requires no discussion to show that, in the case at bar, the application of the rule would plainly defeat the intent of the testator. That intent was that, with respect to each of his children other than the appellant, an equal share of the proceeds of his estate, after its sale, should be "paid over to them respectively at once;" but that the share coming to the appellant should be "paid to Charles Graff and Fred Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid his heirs after his death." The application of the rule contended for would give the appellant as immediate and absolute interest in and control over his share as is given by the will to any other child. See Eshbach's Estate, 197 Pa. St., 153, *infra*.

Appellant places great reliance upon the case of Glover vs. Condell, 163 Ill., 566, and Warner vs. Sprigg, 62 Md., 14.

These cases, we submit, are distinguishable from the case at bar.

In the Illinois case the court lays down the very proposition we are contending for in the case at bar. That the

rule in Shelley's Case "is often applied to grants of personalty by way of analogy for the purpose of construction, and when so applied yields more readily to the apparent intention of the testator than it does in grants of realty," 163 Ill., 587.

In neither case *was there anything in the context of the will under construction to show that the testator did not use the word "heirs" in its primary legal sense.*

In both cases the devise or bequest was an independent one, not connected with any other provision which in any manner might affect it or throw any light upon its meaning, while in the case at bar the provision in respect to the share of appellant was intended to operate as an exception to the general provision for the other beneficiaries.

In both cases the courts held that the direction that the trustee pay over the money at the death of the life tenant constituted an active trust, and hence created an equitable estate in the remaindermen. Is the latter proposition true? In the light of all the authorities, holding that where the purposes of a trust in personal property have ceased, or are at an end, the absolute estate is in the person entitled to the last use, does it not follow that the estate of the remaindermen is legal? The trust having ceased, and the trustees having no further duty to perform with respect to the *cestui que trust*, the remainderman is at once entitled at law to the immediate possession of the subject matter held by the trustees for the former beneficiary, and the latter are not entitled to hold it at all in trust or otherwise for him. Can they, then, be said to be trustees for him? Courts look through form to substance.

Pettingale vs. Barker, 21 D. C., 156;
Drexel vs. Birney, 122 U. S., 254.

As was said substantially by the court in Long vs. Long, *supra,* in which case the direction to pay to the remaindermen was similar to the provision of the will under consideration, and in Bacon's appeal, *supra,* "the testator did not intend that the trustee should hold any estate *after her death.* He contemplated its immediate transmission to the remaindermen, a transmission by conveyance indeed, *but not held in trust* for thoes in remainder."

And so in this case, there was no intention on the part of the testator that the trustees should hold in trust for the remaindermen, but, on the contrary, that the fund should pass immediately to the remaindermen upon the expiration of the life estate. If the bequest were to the trustees "to pay the income for life to Vogt, remainder after his death to his heirs," would not the remainder be a legal estate? If so, looking through form to substance, is not the direction that the trustees shall pay to his heirs the principal at Vogt's death, simply a direction, that they shall perform a legal duty, and the same legal duty which the will would have impressed upon them if the bequest had been in another form, to wit, the form of a bequest over to the heirs on the death of the life tenant, without specifying in words, that the trustees should do simply what it was their legal duty to do without such specification? If so, appellant's contention is that a direction to the trustees to do what the law would have required them to do without that direcion, or in other words, that a mere surplusage shall be given an artificial effect by analogy to the rule in Shelley's Case, which will defeat the testator's intention.

Moreover, the ruling in the Illinois case is based upon a general statement in 1st Perry on Trusts, part of which only is quoted in the opinion. So quoted by the court, the citation is "the legal title to them (chattel interests) will remain in the trustee until the purpose of the trust is accom-

plished, and until the possession of the property is, in some way, transferred to the person entitled to the use or last use."

Continuing, however, the author says, "But when a trust is at an end, the title is in the person entitled to the last use, and a mere delivery without other formality gives such person full and absolute control of the property" or as it is stated in Long vs. Long, 62 Md., at page 66, and Owens vs. Crow in the same report at page 494: "*The absolute estate is in the person entitled to the last use.*"

To our mind, these latter cases, one of which was decided upon the same day as Warner vs. Sprigg, and the other at a later day are at variance with so much of that case as holds the estate of the remaindermen, in the personalty, to be equitable.

And finally the authority of Glover vs. Condell, 163 Ill., 566, is repudiated by the Supreme Court of that State in Lord vs. Comstock, 240 Ill., 492, 505 *et seq.* In that case the court discusses the interpretation to be given to the word "heirs" when used in connection with a bequest affecting personalty. It reviews the authorities respecting the applicability of the rule to personalty, and concludes:

> "The authority and reason of the rule in Shelley's case should not be held to apply to gifts of personalty."

So in Sands vs. Old Colony Co., 195 Mass., 579, it is declared that the rule itself is one of law, not of construction, and was given effect as to real estate, to which alone it in terms applied, however at variance with the express or manifest intention of the donor, citing Trumbull vs. Trumbull, 149 Mass., 200, and Bowers vs. Porter, 4 Pick., 198; but that it is treated in many of the recent decisions, which have extended it to limitations of personal property, as

merely a rule of construction, which will yield to a clear intent of the settlor or donor, citing Taylor vs. Lindsay, 14 R. I., 518; Bucklin vs. Creighton, 18 R. I., 325; Evans vs. Wetherhead, 24 R. I., 502; Bacon's Appeal, 57 Pa. St., 504, 514; Horne vs. Lyeth, 4 Harr. & J., 431; Glover vs. Condell, 163 Ill., 566, 587, and Gray on Perpetuities, Sec. 647, note 3.

With respect to the claim at page 18, of the opposing brief that no legal title could pass to the remaindermen because there can be no remainder after a life estate in chattels, we submit this ancient doctrine has long since been exploded, this court, as far back as Smith vs. Bell, 6 Pet., 68, 78, declaring:

> "The rule that a remainder may be limited, after a life estate in personal property, is as well settled as any other principle of our law."

That the construction contended for by the appellant diametrically opposes and defeats the plain intent of the testator admits of no dispute. His will, as he wrote it, is as follows:

> "The proceeds of said sales shall then be divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick Gieseking, as trustees, and by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death."

As construed by the appellant, the will will read as follows:

> "The proceeds of said sales shall then be divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred H. Vogt, which share shall in like manner be paid over to him at once."

The only argument offered in support of this proposition to defeat and reverse the intention of the testator is, that the court should apply, by analogy, a rule with no other basis than the policy of the feudal system, abrogated more than two centuries ago, and which rule has been very generally abolished by statute in all jurisdictions where it once obtained; the only object to be attained being the removal of a provision which a father has endeavored to make for a spendthrift son, for the protection of himself and his family from his own improvidence. And, in order to effect this attempted application by analogy of the Rule in Shelley's Case, for the above result, each of the four rules hereinbefore referred to, supported by the abundant and eminent authorities cited, must be overruled, namely:

1. That the estate limited to the ancestor and his heirs must be of the same nature or quality.

2. That, where the fund is personalty, the intent of the testator will more readily prevail over the application of the Rule in Shelley's Case, that rule being applicable if at all only by analogy, and not *stricti juris.*

3. That the word "heirs," where used to indicate the testamentary beneficiaries of personal estate, is to be taken as a *designatio personarum,* and not as a word of limitation, unless the context requires the latter construction.

4. That the word "heirs," where it first occurs in the clause of the will in controversy, being manifestly used by the testator in a non-technical sense, and not as a word of limitation, is to be taken as used in that same sense where

it occurs again, in the absence of any indication by the testator that his next succeeding use of the same word was in a changed sense.

There is no error in the decree appealed from, and it should be affirmed.

J. J. DARLINGTON,
LEON TOBRINER,
Solicitors for Appellee.

VOGT *v.* GRAFF AND VOGT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 73. Argued November 17, 1911.—Decided January 9, 1912.

The rule in Shelley's case is a rule of property in the District of Columbia, and the question for this court to determine is not whether it has or has not a legal foundation, or is or is not a useful rule of property, but whether it applies to the case in controversy.

Where the testator directs that on the sale of his real estate the proceeds be divided and paid over to his heirs at once, except the share of a specified heir which shall be paid to trustees to be by them invested, the income thereon to be paid to such heir, the principal to be paid to his heirs after his death, the application of the rule in Shelley's case would destroy the radical distinctions intended by the testator, and the rule does not apply.

Notwithstanding the peremptory force of the rule in Shelley's case, where there are explanatory and qualifying expressions showing a clear intention of the testator to the contrary, the rule must yield and the intention prevail. *Daniel* v. *Whartenby*, 17 Wall. 639.

A condition of the rule in Shelley's case is that the particular estate and the estate in remainder must be of the same quality, both legal or both equitable, and where the former is equitable and the latter is legal, the rule does not apply and the two estates do not merge.

Quære: Whether in the case at bar the estate in remainder is legal or equitable.

Quære: Whether the rule in Shelley's case is applicable to personal property.

33 App. D. C. 356, affirmed.

THE facts, which involve the construction of a will made by a resident of the District of Columbia, are stated in the opinion.

Mr. John C. Gittings, with whom *Mr. Justin Morrill Chamberlin* was on the brief, for appellant:

Until the court below rendered the decision in this

case, it was conceded that the "Rule in Shelley's Case" was applicable to personal property in this jurisdiction. *Garth* v. *Baldwin*, 1755; 2 Vesey Sr., Ch. Rep. 646. *Horne* v. *Lyeth*, 4 Harris and Johnson, 435, holds this case was binding authority, and it has ever since been followed in the Maryland courts. See also *Warner* v. *Sprigg*, 62 Maryland, 14, and *Hughes* v. *Nicklas*, 70 Maryland, 482; *Engle* v. *Mades*, 25 Wash. Law Rep. 220; *Simms* v. *Georgetown College*, 1 App. D. C. 79, 80.

If the rule has any application to personal property at all, it has the same force and effect as when applied to real estate. If applied by analogy, it must be applied, of course, under the same circumstances and conditions; consequently it is a rule of law and not a rule of construction.

Being a rule of law, it is inflexible and will necessarily override any intention of a testator to the contrary in those cases where it is applicable. *Horne* v. *Lyeth*, *supra*.

There may be a class of cases involving executory trusts where courts have not applied the rule. But in the case at bar, by no possible torture of the testator's language can it be construed to read as an executory trust. *Neves* v. *Scott*, 9 How. 211; 2 Underhill on Wills.

A mere direction to convey the legal title or to pay over a fund where the limitations of the trust are complete, does not alone make a trust executory. *Rowan* v. *Chase*, 94 U. S. 818; *Cushing* v. *Blake*, 30 N. J. Eq. 689, 670; *Edgerton* v. *Lord Brownlaw*, 4 H. L. C. 1210. The "Rule in Shelley's Case" must be applied in a court of equity to the same extent as in courts of law, when the trust estate is executed. Preston on Estates, 362; Ferne on Remainders, 157; *Bale* v. *Coleman*, 1 P. Williams, 142; *Simms* v. *Georgetown College*, *supra*.

The very moment we attempt to treat the "Rule in Shelley's Case" as subservient to a testator's intention, we absolutely efface and obliterate it as a rule of law, and turn it into a mere rule of construction. If this can be

done when the subject-matter is personalty, what analogy is there in its application to real estate? None.

For authority for its decision the court below cites a case long since overruled on every point upon which it was decided, viz.: *Bacon's Appeal*, 57 Pa. St. 504, 514. See *Grimes* v. *Shirk*, 169 Pa. St. 174, 181; *McCann* v. *Berkley*, 204 Pa. St. 214; *Shopley* v. *Diehl*, 203 Pa. St. 566, 569.

The rule of construction is that if technical words are used they must be given their primary legal meaning, unless there is something on the face of the will that shows not only that they were not so used by the testator, but will clearly show in what sense they were used. *Daniel* v. *Whartenby*, 17 Wall. 643; *Van Grutten* v. *Foxwell*, reported in Appeal Cases, L. Rept. (1897), 658, 684.

Although the Chief Justice of the court below quotes the rule of construction laid down by this court in *Daniel* v. *Whartenby*, *supra*, he immediately thereafter ignores it.

There are no inconsistent words in that paragraph of the devise in question, and there is a total absence of any qualifying words in that or any other paragraph which shows or tends in any manner to show that the testator used the word "heirs" in the sense of "children."

The word "heirs" may or may not be appropriate; this would entirely depend upon the sense in which the testator used it. From the context of the will there is absolutely no ground for a court saying that the word "heirs" was not used by the testator in its primary technical sense.

That the testator was a layman does not appear anywhere in the record, or whether he was learned in the law, as the record is silent upon that point, unless it be the will itself, which shows beyond question that it was prepared by one skilled in legal lore, and unquestionably knew the legal difference between the words "heirs" and "children."

When we find him using the word "heirs" as a designation of those who were to take the appellant's share after death, it can hardly be said that he meant to use the word

"heirs" in any other sense than that in which he had previously used it: that is, its primary legal sense—those who would take real estate if plaintiff should die intestate.

If the court below is right and the word "heirs" was construed to mean those who would take under the statute of distribution—and for instance, suppose the infant Mathilda should die before her father—the widow of the testator, appellant's mother, would then take appellant's entire share, and his brothers and sister, who were the testator's "heirs," would be entirely cut off. Could this have been the testator's intention? Hardly so. That it was the testator's intention that appellant should have only a life estate in the fund may be perfectly true, but that would not in any manner alter the sense in which the word "heirs" was used.

It might be conceded that in 99 out of 100 cases where the "Rule in Shelley's Case" has been applied to a will, the testator's intention has been that the ancestors should take only a life estate. The inquiry has always been, What was his intention as to the remainder? Did he use the word "heirs" as a word of limitation? If not, did he use it in some other sense, and if he did, in what sense did he use it? That is the sole inquiry, and for that reason the fact that a testator intended to give the ancestor only a life estate can in no way throw light upon his intention or show what he meant when using the word "heirs" as a designation of those who were to take a remainder.

Under the tenth paragraph of the will, the ancestor, appellant, and heirs take the same quality of estates; both are equitable. See Hill on Trustees, 288; Perry on Trusts, § 311; *Denton* v. *Denton*, 17 Maryland, 43; *Warner* v. *Sprigg*, 62 Maryland, 14; *Long* v. *Long*, 62 Maryland, 68; *Glover* v. *Condell*, 163 Illinois, 566; see also *Garth* v. *Baldwin*, 2 Vesey, 648; *Engle* v. *Mades*, 25 Wash. L. Rep. 229; *Webb* v. *Webb*, 1 P. Williams, 132; *Robinson* v. *Fitzherbert*, 2 Bro. Ch. Rep. 127.

The cases do not sustain the opinion of the court below to the effect that as the trust is expressly limited to the life estate of Fred. H. Vogt, the remainder to the heirs is a legal estate, and hence there can be no union of the two estates under the "Rule in Shelley's Case." *Denton* v. *Denton*, 17 Maryland, 407; *Owens* v. *Crow*, 62 Maryland, 491, distinguished.

Westcott v. *Edmonds*, 68 Pa. St. 34; *Renzeihauzen* v. *Kaiser*, 48 Pa. St. 351, and *Bacon's Appeal*, 57 Pa. St. 505, cited in appellee's brief, were all cases dealing with trusts relating to real property; neither do cases apply which are suits brought by the *heirs* after the death of the ancestor, claiming that the trust has ceased, as *Denton* v. *Denton; Owens* v. *Crow, supra; Hooper* v. *Felgner*, 80 Maryland, 262; *Long* v. *Long*, 62 Maryland, 33, and *Lee* v. *O'Donnell*, 95 Maryland, 538.

Mannerback's Estate, 133 Pa. St. 342; *Mercer* v. *Hopkins*, 88 Maryland, 292, and *Mercer* v. *Safe Deposit Co.*, 91 Maryland, 102, cited by appellee are not applicable, and do not throw any light upon the case at bar.

To disregard the settled rules of interpretation, sanctioned by a succession of ages and by the decisions of the most enlightened judges, under pretext that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction boundless in its range and pernicious in its consequence.

Mr. J. J. Darlington and *Mr. Leon Tobriner* for appellees.

Mr. Justice McKenna delivered the opinion of the court.

Bill in equity filed in the Supreme Court of the District of Columbia by the children of John L. Vogt to determine the meaning of a clause in the latter's will.

The defendants in the case, appellees here, were Charles Graff and Frederick C. Gieseking, executors and trustees named in the will, and Matilda S. Vogt, infant daughter of one of the complainants, appellant here, Frederick H. Vogt.

The part of the will to be construed is as follows:

"All the rest and residue of my real estate, shall, when my youngest surviving child attains the age of 21 years or one year thereafter in the discretion of my executors, be sold by my executors at public auction after due notice in the news papers of this city. The proceeds of said sales shall be then divided among my heirs, share and share alike, and paid over to them respectively at once, excepting the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick C. Gieseking, as trustees, by them invested, the income therefrom to be paid said Fred H. Vogt, the principal to be paid to his heirs after his death."

Regarding this provision as a simple composition of English words, we should have no difficulty in deciding that the testator intended to give to Frederick H. Vogt a life estate in the designated share. But it is contended that the meaning of the testator is determined otherwise by the rule in Shelley's case. The rule is thus laid down: "Where the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the 'heirs' are words of limitation of the estate and not words of purchase." 1 Co. 104; *Daniel* v. *Whartenby*, 17 Wall. 639, 641; *Green* v. *Green*, 23 Wall. 486, 488.

It will be observed that under the rule by a technical circumlocution one estate only is created, though two parts are expressed, a particular estate for life with a remainder to the heirs of him who takes the particular estate. The rule, therefore, has been a fruitful source

of controversy. On the one hand it has been praised as having a substantial foundation and necessarily expressing and enforcing essential legal distinctions in the transfer of property; to be, indeed, the very opposite of a technical rule and one "established through a long course of decisions extending over a great many generations," and declared therefore to be a rule of substance in order to give effect to the intention of the grantor or testator. On the other hand, it is attacked as oftener defeating intention than executing it, being applied as an absolute and peremptory obligation to convey or devise an estate in fee simple even against an express declaration to the contrary. Invective, therefore, has been employed against it, and even ridicule; and English and American judges, while yielding to it, have pronounced it unjust. We, however, need not enter into the field of controversy. Whether it had a legal and substantial foundation when first pronounced or yet has, whether it is a useful rule of property or part of the debris of an ancient system having now only the mischievous vitality of frustrating the intention of a grantor or testator, we need not consider.

It is conceded to be a rule of property in the District of Columbia, and we are brought to the question whether, consistently with it, the intention which we have seen Vogt has expressed may be executed.

The statement of the rule we have given. There are certain conditions attached to it which give precision to its application. One of these is that the remainder after the particular estate must be to heirs of the whole line of inheritable blood, designating those who are to take from generation to generation. And they must be heirs of him who takes the particular estate, and by devolution from him.

This is important to be observed. The heirs must take from the first taker and not be a description of a class taking from the testator, becoming themselves,

"the root of a new succession." *Guthrie's Appeal*, 37 Pa. St. 9. Hargrave in his Law Tracts, states the test to be "whether the party entailing means to build a succession of heirs on the estate of the tenant for life." If he does not, but intends to describe a class taking from him, the rule does not apply. We proceed to illustrate this.

Kemp v. *Reinhard*, 228 Pa. St. 143, expresses the principle, and its facts bring it into close similarity to the case at bar. In that case the testatrix gave to her son, Jacob E. Kemp, the use and income of seven enumerated properties, "for and during his lifetime." Then followed this clause: "And immediately after the decease of the said Jacob E. Kemp, I give and devise the above-described seven tracts or pieces of land devised to him herein for life to his issue in fee. Should he, however, die without leaving issue living, I give and devise the same unto my son Pierce G. S. Kemp, his heirs and assigns in fee." The court said (p. 147):

"Though the intention of the testatrix may have been to give only a life estate to the appellant, if in the devise there was a limitation of the estate to his heirs to take by devolution from him at his death, her intention is overridden by the rule in Shelley's case; but in every case in which the application of that rule is involved the first question is whether the devisor or grantor intended a limitation of the remainder in fee or in tail as such to the heirs of the first taker, or that there should be the root of a new succession taking directly from the devisor or grantor as purchasers. When the latter intention appears the rule has no place and the intention must be given effect".

And further (p. 147):

"'It is very carefully to be noted, that in searching for the intention of the donor or testator, the inquiry is not whether the remainder-men are the persons who

would have been heirs, had the fee been limited directly to the ancestor. The thing to be sought for is not the persons who are directed to take the remainder, but the character in which the donor intended they should take. In the very many cases in which the question has arisen, whether the rule was applicable, the difficulty has been in determining whether the intention was that the remaindermen should take as heirs of the first taker, or originally as the stock of a new inheritance.' *Guthrie's Appeal*, 37 Pa. 9."

Hall v. *Gradwohl* (1910), 113 Maryland, 293, is also somewhat similar to the case at bar, and we quote the more readily since it is said that the rule in Shelley's case prevails in the District of Columbia because it prevailed in the law of Maryland. After discussing the rule the court said that "it is not a favored" one "in the law of Maryland, although the court will never refuse to apply it in a proper case." And it was decided that where the particular intention of the testator is not to use the words of inheritance in their full legal sense, but "as mere *descriptio personarum* or a particular designation of individuals who were to take as purchasers at his death," the rule should not prevail. The will passed on made certain bequests and devises and then provided: "The balance of my estate to be equally divided among my five children or their heirs, share and share alike," with this proviso: "That the portion to which my daughter Sarah Gradwohl may be entitled shall be invested in some safe stocks or other securities, the said Sarah Gradwohl to receive the income from the same during the term of her natural life, and at her death to be equally divided among her children or legal heirs." The court refused to apply the rule. To apply the rule it was said that the words "children or legal heirs" would have to be treated as words of limitation, that is, as "marking out the extent and duration of her interest." This construction the

court rejected as consonant with "neither reason, policy, justice nor equity," and could only be supported by giving to the words "'legal heirs,' which are superadded to the word 'children,' the arbitrary meaning placed upon them by an artificial rule of law." The court, after an analysis of the will, decided that it plainly manifested a particular intention to use those words as mere *descriptio personarum* as a particular designation of individuals who were to take as purchasers at the death of the testatrix.

The conclusion of the court was based upon the special provision of the will which directed that the portion given to the testatrix's daughter Sarah should be invested in some safe stocks or securities, and that Sarah should "receive the income from the same during the term of her natural life," and should be at her death "equally divided among her children or legal heirs." This language, the court added, manifested a particular intention on the part of the testatrix "to use the words as mere *descriptio personarum*. . . . In such cases, under all of the authorities, the rule in Shelley's case does not apply."

A like intention is expressed in Vogt's will. His real estate, after satisfying particular devises, is directed to be sold when his youngest surviving child shall attain the age of twenty-one years. The proceeds he directs "shall be then divided among my heirs, share and share alike, *and paid over to them, respectively, at once*, except the share coming to my son, Fred H. Vogt. Said share shall be paid to Charles Graff and Frederick C. Gieseking, as trustees, by them invested, the income therefrom to be paid to said Fred H. Vogt, the principal to be paid to his heirs after his death." If the rule in Shelley's case be applied, it will destroy all of the distinctions that the testator has expressed. The distinctions are radical, and must be looked to in ascertaining his intention. And this was done, as we have seen, in *Hall* v. *Gradwohl*, *supra*, and it was done, too, we may say, in *Kemp* v. *Reinhard*,

supra. The latter case has not the infirmity that counsel for appellant ascribes to some of the earlier Pennsylvania cases of regarding the rule as one of construction, yielding to and not overriding the intention, as, it is contended, its unflinching and dominating character requires.

The intention of the testator, therefore, may have some sway. We may inquire, at least, as to his intention in the use of the word "heirs," whether as taking from him or as taking from the life tenant. The rule "is silent until the intention of the grantor or devisor is ascertained." *Kemp* v. *Reinhard, supra.*

Of Vogt's intention we have no doubt. It is made clear by the distinctions to which we have adverted. To his other children their shares are to be delivered immediately upon the sale of the real estate. To appellant there is nothing of his share to be delivered at all. It is to be delivered to others for him, he to receive, not the body of the share, but only the revenue from it. He is separated from it completely. He does not handle it or direct its investment, and after his death, the testator, through trustees he has selected, directs it to be delivered to persons designated by him, or, to use the language of the cases, described by him as taking from him. Opposing reasoning, it is true, might be brought forward, but this court, while asserting and recognizing the peremptory force of the technical terms of the rule, has said: "But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intention of the testator, the former must yield and the latter must prevail." *Daniel* v. *Whartenby, supra.*

Another condition of the application of the rule is that the particular estate and the estate in remainder must be of the same quality, both legal or both equitable. The Court of Appeals decided that such condition did not exist and, on that ground, as well as on that which we have discussed, held adversely to appellant. In other words, the

court decided that the estate given to appellant was equitable and the estate devised to the daughter legal, and that, therefore, the estates did not merge. It is admitted that the estate taken by appellant is equitable; the contentions of the parties turn upon the character of the estate given to his daughter. We will not consider the contentions, nor whether the rule is applicable to personal property. We rest our decision on the ground discussed by us.

Judgment affirmed.